. 88-1668-CFX
atus: GRANTED

Title: Atlantic Richfield Company, Petitioner
v.
USA Petroleum Company

ocketed:
pril 7, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Redcay,Ronald C.

Counsel for respondent: Blecher,Maxwell M.

ntry	Date	Note	Proceedings and Orders
1	Apr 7 1989	G	Petition for writ of certiorari filed.
2	May 11 1989		Brief of respondent USA Pet. Co. in opposition filed.
3	May 16 1989		DISTRIBUTED. June 1, 1989
4	May 18 1989	X	Reply brief of petitioner Atlantic Richfield filed.
5	Jun 5 1989		Petition GRANTED.
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7	Jul 10 1989		Order extending time to file brief of petitioner on the merits until August 3, 1989.
8	Aug 3 1989		Brief amicus curiae of FTC filed.
9	Aug 3 1989	G	Motion of American Newspaper Publishers Association for leave to file a brief as amicus curiae filed.
10	Aug 3 1989		Joint appendix filed.
11	Aug 3 1989		Brief of petitioner Atlantic Richfield filed.
13	Aug 18 1989		Order extending time to file brief of respondent on the merits until September 20, 1989.
14	Aug 19 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Sep 20 1989	G	Motion of Society of Independent Gasoline Marketers of America for leave to file a brief as amicus curiae filed.
16	Sep 20 1989	G	Motion of Service Station Dealers of America for leave to file a brief as amicus curiae filed.
17	Sep 20 1989		Brief of respondent USA Pet. Co. filed.
18	Sep 20 1989		Brief amici curiae of California, et al. filed.
19	Sep 25 1989		Motion of American Newspaper Publishers Association for leave to file a brief as amicus curiae GRANTED.
20	Sep 25 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Sep 25 1989		Record filed.
		*	Certified copy of C. A. Proceedings, 2 volumes, received.
23	Sep 26 1989		SET FOR ARGUMENT TUESDAY, DECEMBER 5, 1989. (2ND CASE)
22	Sep 29 1989		Record filed.
		*	Certified copy of original record, 7 volumes, box, received.
24	Sep 29 1989		CIRCULATED.
25	Oct 10 1989		Motion of Society of Independent Gasoline Marketers of America for leave to file a brief as amicus curiae GRANTED.
26	Oct 10 1989		Record filed.

No. 88-1668-CFX

Entry	Date	Note	Proceedings and Orders
		*	Certified copy of reporter's transcript, 3 volumes, received.
27	Oct 16 1989		Motion of Service Station Dealers of America for leave to file a brief as amicus curiae GRANTED.
28	Oct 19 1989	X	Reply brief of petitioner Atlantic Richfield filed.
29	Dec 5 1989		ARGUED.

88-1668

No. 88-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
USA PETROLEUM COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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90 pp

QUESTION PRESENTED

The Ninth Circuit's decision presents the following fundamental question concerning this Court's antitrust injury requirement limiting the type of loss for which a private plaintiff may bring an antitrust action:

> Whether a competitor's profits and sales lost as a result of nonpredatory prices imposed by a manufacturer on its retailers through vertical maximum price fixing amount to antitrust injury necessary for the competitor to bring a private antitrust action.

The Ninth Circuit panel, which divided two to one, admitted that this antitrust injury issue was a "difficult" one on which its decision directly conflicted with a prior Seventh Circuit decision.* A subsequent Seventh Circuit decision acknowledged the conflict within the Circuits that the Ninth Circuit decision in this case had created and stated that the Ninth Circuit rule "stand[s] the antitrust injury inquiry on its head."**

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* *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

** *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 n.6 (7th Cir. 1989).

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No. 88-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 198?

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

USA PETROLEUM COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Atlantic Richfield Company ("ARCO") respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on October 7, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 687 and appears as Appendix A to this Petition. The District Court's unreported ruling granting ARCO summary judgment dismissing plaintiff's Sherman Act § 1 claim appears as Appendix B to this Petition.

JURISDICTION

The Court of Appeals entered its judgment in this case on October 7, 1988. The Court of Appeals denied a timely

petition for rehearing and suggestion for rehearing *en banc* on January 10, 1989. (Appendix C hereto.) This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

STATEMENT OF THE CASE

The Ninth Circuit decision here would resuscitate the efforts of USA Petroleum Company ("USA Petroleum") to recover in the courts through a Sherman Act lawsuit the sales and profits it lost to increased competition in the marketplace from low retail prices for ARCO-brand gasoline.

The Competition Between USA and ARCO Brands of Gasoline

ARCO is an integrated oil company which, among other things, refines and markets gasoline throughout the western United States. ARCO markets gasoline to consumers directly through its own gasoline stations and indirectly through independently owned ARCO-brand dealers.

USA Petroleum puchases gasoline from refiners for sale at its USA-brand stations. Some of these USA-brand stations compete with ARCO-brand stations in the market for sales of gasoline to consumers.

The Increased Price Competition From ARCO-Brand Gasoline

This lawsuit arose as a result of ARCO's highly successful marketing program instituted in April 1982 pursuant to which ARCO discontinued its credit card and otherwise acted to lower its costs of refining and selling gasoline. Those cost-cutting measures enabled ARCO to lower the retail prices for gasoline sold at its own stations and more importantly here to lower the wholesale prices to independently owned ARCO-brand gasoline dealers. These ARCO-brand dealers, in turn, lowered their retail prices to consumers.

Some of the ARCO-brand stations that lowered their prices competed directly with USA-brand stations for sales to consumers. USA alleges that the lower prices at such ARCO-brand stations in California and Washington caused the competing USA-brand stations either to reduce their prices or to lose sales to ARCO stations.

As a result of its marketing program, the ARCO-brand share of the retail gasoline market in California and Washington increased from approximately 10% to 12% in 1981 to approximately 14% to 16% in 1983. (SR 79:193.) As the District Court found (in findings not challenged on appeal), the ARCO-brand share of that market never exceeded 17% during any relevant period. App. B, ¶ 3. As the District Court also found, this market share is clearly

insufficient for ARCO to exercise market power over retail gasoline prices. *Id.* at ¶¶ 3, 4.

USA Petroleum's Lawsuit

In May 1983, USA Petroleum commenced this lawsuit challenging ARCO's marketing program. It sought both injunctive relief and treble damages measured by the sales and profits allegedly lost at USA stations as a result of competition from the low retail prices at the competing ARCO-brand stations. USA Petroleum sued only ARCO, and not any ARCO-brand dealers.

USA Petroleum's Complaint asserted a host of federal and state law claims. Its essence, however, was a claim that ARCO had attempted to monopolize the retail gasoline market by engaging in predatory pricing, in violation of Sherman Act § 2. The Complaint also alleged that ARCO had engaged in vertical maximum price fixing with its dealers in violation of Sherman Act § 1.

The District Court dismissed the original Sherman Act § 2 claim because the Complaint alleged facts showing that ARCO could not successfully monopolize the market. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983). USA Petroleum amended its complaint to allege that ARCO was attempting to monopolize the "discount segment of the gasoline market," which it alleged constituted a separate and distinct market for antitrust purposes. The District Court, while highly skeptical that the claim could succeed when put to a factual test, felt compelled not to dismiss the amended Sherman Act § 2 claim at the pleading stage. (CR 54.) Accordingly, the attempted monopolization case proceeded, putting ARCO to the burden of exhaustive document discovery.

ARCO's Summary Judgment

At the conclusion of document discovery, ARCO moved for summary judgment dismissing the Sherman Act §§ 1 and 2 claims. The motion was based upon an extensive factual record showing that ARCO and the other sellers of ARCO-brand gasoline, individually or collectively, posed no real threat of acquiring monopoly power in any relevant market: There are simply too many competitors in the gasoline market, and ARCO gasoline has far too small a share of that market, for ARCO (and its dealers) ever to obtain the power to charge supracompetitive prices. This lack of market power, actual or threatened, precluded USA Petroleum from establishing one of the substantive elements of a Sherman Act § 2 claim — dangerous probability of monopolization — and therefore required dismissal of that claim. It similarly precluded USA Petroleum from establishing that the challenged ARCO-brand prices were predatory and thereby from satisfying the antitrust injury requirement imposed by Clayton Act § 4 as a condition for a private action based upon the Sherman Act, even assuming *arguendo* that USA Petroleum could prove price fixing.

Confronted by ARCO's motion, USA Petroleum promptly stipulated to dismiss with prejudice its Sherman Act § 2 claim. USA Petroleum admitted that ARCO could not monopolize the retail gasoline market. USA Petroleum, however, asserted that its § 1 claim permitted it to recover all the damages sought by its § 2 claim, but without the need to make any showing that its injuries as a competitor reflected or flowed from injury to competition in a relevant market.

The District Court granted ARCO summary judgment dismissing the § 1 claim. In granting summary judgment, the District Court assumed that USA Petroleum could

prove that ARCO violated Sherman Act § 1 and that USA Petroleum had lost profits and sales as a result of having had to compete against the lower fixed prices at ARCO-brand stations. The District Court held that USA Petroleum's lost profits and sales did not constitute antitrust injury, required by Clayton Act § 4 in a private damage action, in which the plaintiff must establish not only the defendant's violation but also its liability to the specific private plaintiff bringing the action.

The District Court directed the entry of judgment on the Sherman Act § 1 claim pursuant to Fed R. Civ. P. 54(b) so that USA Petroleum could appeal this determinative issue of law. The parties agreed to stay the remainder of the action pending disposition of the appeal.

The Ninth Circuit Decision

A panel of the Ninth Circuit, dividing two to one, reversed the District Court's summary judgment and remanded the § 1 claim for trial.

The majority opinion stated that the antitrust injury issue was a "difficult question" and one of "first impression" within the Ninth Circuit. It also recognized that the Seventh Circuit previously had decided the very same issue in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (*"Jack Walters"*). However, the majority refused to follow the Seventh Circuit rule that a plaintiff suffers antitrust injury only when its competitor's prices set by vertical maximum price fixing are predatory. Instead, it in essence held that a competitor establishes antitrust injury simply by showing that its injuries were caused in fact by the lower prices resulting from vertical maximum price fixing because such price fixing is *per se* illegal. 859 F.2d at 697.

The dissent disagreed. It read this Court's controlling case law on antitrust injury to require an antitrust plaintiff to establish more than cause-in-fact — specifically, to establish that the plaintiff's "alleged injury results from the *anticompetitive* aspects of" the violation — even where the violation is *per se* illegal. 859 F.2d at 701. And, the dissent found that USA Petroleum could not establish antitrust injury here because of the unchallenged District Court finding that the fixed prices were not predatory. *See id.* at 703-705.

ARCO filed a petition for rehearing and suggestion that the rehearing be *en banc* because of the conceded conflict with the Seventh Circuit. During the pendency of that petition, the Seventh Circuit in a unanimous opinion by the Chief Judge reaffirmed its antitrust injury rule limiting competitor suits to predatory vertical maximum price fixing. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989). That opinion stated that the Ninth Circuit decision, by reducing the antitrust injury requirement to a mere cause-in-fact test for *per se* violations of the Sherman Act, stood "the antitrust injury inquiry on its head." 864 F.2d at 1419 n.6. Four days later, the Ninth Circuit panel denied ARCO's petition for a rehearing. App. C.

REASONS FOR GRANTING THE WRIT

The direct conflict which both the Seventh and Ninth Circuits concede exists on this important issue of antitrust law cries out for resolution by this Court. The Court should resolve the conflict by granting certiorari and reversing the Ninth Circuit.

The Court should review the Ninth Circuit rule because it creates a new antitrust cause of action which, rather than furthering the objectives of antitrust law, could be

used by competitors to stifle competition. The novelty of the cause of action is amply demonstrated by the absence of even one prior reported opinion permitting a competitor to sue for profits lost as a result of vertical maximum price fixing. The hundreds of published opinions involving vertical maximum price fixing were brought by dealers who succumbed to their supplier's price coercion or who were terminated because they refused to succumb. The Ninth Circuit would create additional cases brought by a whole new class of plaintiffs. These competitor cases not only would further burden the federal courts, but they also would run counter to policies underlying this Court's most recent decisions imposing limitations on the classes of private plaintiffs who can sue for antitrust violations.

The Ninth Circuit rule directly impacts the policy barring private antitrust actions "inimical to the purposes of" the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Maximum vertical price fixing by definition results in immediately lower prices to consumers. The lower prices reflect correspondingly smaller profits to the participants in the price fixing and to their competitors who reduce prices to meet the increased competition. Where the lower prices are not predatory — *i.e.*, where they will not lead to market power that will enable supracompetitive prices in the future — these losses represent gains to consumers that will never be offset. The allowance of private antitrust actions to recover these competitor losses denies consumers lower prices in order to compensate competitors for lost profits. By preventing lower nonpredatory prices such actions are "inimical" to consumer welfare, which this Court has identified as the overriding purpose of the Sherman Act. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' "). And, by doing so to compensate competitors they improperly elevate the protection of competitors over the protection of competition. *See Brunswick*, 429 U.S. at 488.

Moreover, the allowance of such competitor antitrust actions could deprive consumers of lower prices in many cases which do not even involve vertical price fixing. Thus, as is the case here (*see* p. 26 n. 9 below), competitors will attempt to prove vertical maximum price fixing with evidence that a manufacturer granted its dealers discounts or lower prices and suggested that the dealers pass along the lower price in order to increase their sales volume. Such conduct is the essence of interbrand competition and is unquestionably beneficial to consumers. The existence of competitor treble damage actions in which that precise conduct may be used as evidence of price fixing, however, will cast a chill upon this vigorous competition. Manufacturers whose products reach consumers through dealers will hesitate to embark on programs to reduce prices to consumers, such as ARCO's here and that involved in the *Indiana Grocery* case. The result will be to deprive consumers of lower prices and to erect a price umbrella benefitting inefficient competitors.

In a series of recent opinions, this Court has warned against allowing antitrust actions that likely could cause suppliers "to forgo legitimate and competitively useful conduct rather than risk treble damages . . . ." *Business Electronics Corp. v. Sharp Electronics Corp.*, ____ U.S. ____, 108 S.Ct. 1515, 1521 (1988) ("*Sharp*"); *see Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 n. 17 (1986) ("*Cargill*"); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594-95 (1986) ("*Matsushita*"); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984) ("*Monsanto*"). These and other decisions of this Court confirm the correctness of the Seventh

Circuit's decision not to create in competitors a new cause of action for vertical maximum price fixing. As demonstrated below, the Ninth Circuit's contrary decision is based upon a misreading of this Court's opinions on antitrust injury and on vertical maximum price fixing. The Court should resolve the conflict by reaffirming the principles underlying its prior opinions and adopting the Seventh Circuit's rule.

I.

A COMPETITOR'S LOSSES FROM NONPREDATORY PRICES SET BY VERTICAL MAXIMUM PRICE FIXING ARE NOT ANTITRUST INJURY

Antitrust injury requires a careful analysis of the relationship between the specific injury suffered by the plaintiff and the reasons why the defendant's conduct causing that injury violates the antitrust laws. This Court's antitrust injury opinions from *Brunswick* through *Cargill* make clear that a private antitrust plaintiff can sue only when the nature of its injury reflects the anticompetitive effects that make the conduct unlawful.

The Ninth Circuit majority opinion, however, eschewed this careful analysis. Rather than examining the specific nature of the injury suffered by USA Petroleum, the majority focused on the generalized "disruption of competition in the plaintiff's market caused by the defendant's antitrust violation." 859 F.2d at 693. Moreover, the majority in essence found that such disruption exists as a matter of law whenever the conduct is *per se* illegal. And, rather than examining the anticompetitive effects underlying the *per se* illegality of vertical maximum price fixing, the majority focused on "the injury done to the market and to competitors by price-fixing" in general. *Id.* at 697. Having misapplied both elements of the analysis, the

majority in effect converted the antitrust injury inquiry into nothing more than a cause-in-fact test.

As the dissent in the Ninth Circuit and the Seventh Circuit in *Indiana Grocery* recognized, the majority thereby confused the antitrust injury requirement imposed by Clayton Act § 4 with the substantive requirements of a Sherman Act § 1 violation. While the latter focuses on competitive conditions in the market as a whole, the former focuses on the type of injury claimed by a particular plaintiff. As demonstrated below, the correct analysis shows that a competitor's losses from vertical maximum price fixing are not antitrust injury.

A. A Plaintiff Suffers Antitrust Injury Only Where Its Injuries Reflect The Anticompetitive Effects That Make The Defendant's Conduct Unlawful

This Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (*"Brunswick"*), held that a plaintiff under Clayton Act § 4 must:

> "prove *antitrust* injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

The plaintiffs in *Brunswick* had won a jury verdict of \$2,358,000 (before trebling), representing profits they would have earned if competing bowling alleys acquired by defendant through acquisitions assumed to violate Clayton Act § 7 had instead been allowed to go out of business, as those alleys would have done but for the assumed illegal merger. The Court held that the mere showing that plaintiffs' injury had been caused in fact by an antitrust violation did not satisfy Clayton Act § 4. *Id.*

The Court held that the plaintiffs also had to show that their injury reflected the "reason the merger was condemned" under the antitrust laws. 429 U.S. at 487. The merger would be illegal, as it was assumed to be for purposes of the appeal, because it created a deep pocket competitor that could have engaged in predatory conduct. *Id.* The plaintiffs' losses, however, resulted simply from continued competition from these centers that otherwise would have gone out of business, and not from any predatory conduct. The Court refused to allow an antitrust recovery in these circumstances because it would "divorce[] antitrust recovery from the purposes of the antitrust laws," would allow recovery for all dislocations caused by an antitrust violation "regardless of whether those dislocations have anything to do with the reason the [conduct illegal under the antitrust laws] was condemned" and "would authorize damages for losses which are of no concern to the antitrust laws." *Id.* (footnote omitted). The Court further noted that the plaintiffs, in effect, were complaining of injury caused by increased (but nonpredatory) competition. Allowing recovery for such injuries would be "inimical to the purposes of these [antitrust] laws," because "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*' . . . ." *Id.*

By relating the private remedies for an antitrust violation to the reasons why the conduct is unlawful, the Court announced a limitation akin to the common law rule barring recovery for injuries different from those which a statute was designed to prevent.[1] *See Jack Walters,* 737

[1]In one of the early cases in which this doctrine was established, *Gorris v. Scott,* 9 L.R.-Ex. 125 (1874), the court held that a shipper could not recover damages for sheep lost overboard while in the care of the defendant shipowner despite the defendant's violation of an

F.2d at 708-09 (*Brunswick* represents "the application to antitrust law" of this tort doctrine).

The *Brunswick* opinion in this respect anticipated the Court's statement in *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 533 (1983), that Congress "assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." (Footnote omitted.) The antitrust injury requirement, moreover, serves important, modern-day antitrust policies. Even conduct *per se* unlawful under the antitrust laws can have both procompetitive and anticompetitive aspects. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 50 n.16 (1977). By limiting the class of antitrust plaintiffs to those that suffer from the anticompetitive aspects of the unlawful conduct, the antitrust injury requirement prevents recoveries that at best are fortuitous and may even be anticompetitive.[2]

This exposition of the requirement's theoretical underpinnings demonstrates the error of the Ninth Circuit majority's conclusion that antitrust injury in essence

Act of Parliament requiring that animals being shipped be held in pens. The court did so because the Act had been passed to keep the animals from contaminating each other, not to keep them from being swept overboard. While the lack of pens was a "but for" cause of the loss of the sheep, that loss did not reflect the policies underlying the Act and thus was not compensable.

[2]Commentators have expressed the purpose of the antitrust injury requirement in similar terms. *See, e.g.,* Page, *The Scope of Liability for Antitrust Violations,* 37 Stan. L. Rev. 1445, 1461 (1985) ("The requirement of antitrust injury — that compensable harm be attributable to the anticompetitive aspect of a practice — thus serves to keep the size of the damage award related to the basis of substantive liability.")

equates to cause-in-fact for *per se* violations. The *per se* label is irrelevant to the antitrust injury issue because it serves only to establish that the challenged conduct has caused *some* anticompetitive effect in the market justifying *per se* illegality whereas antitrust injury focuses on the *precise injury* claimed by the *specific plaintiff*. *Indiana Grocery,* 864 F.2d at 1419 ("While sections 1 and 2 of the Sherman Act focus on competitive conditions in the market as a whole . . . section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be 'antitrust injury.' ") (Citation and footnote omitted). Where the plaintiff's injury does not reflect the anticompetitive effects that make the conduct *per se* illegal it is improper to presume antitrust injury from *per se* illegality.[3] As demonstrated below, such is the case here.

B. A Competitor's Losses Do Not Reflect The Anticompetitive Effect That Makes Vertical Maximum Price Fixing Per Se Illegal

The Court twice has held that vertical maximum price fixing is *per se* illegal. *Albrecht v. Herald Co.,* 390 U.S. 145, 152-53 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951). Those holdings have engendered much debate, which has focused both on the "maximum" and the "vertical" aspects of the price fixing.[4]

[3]In addition to the Ninth Circuit, the Fourth Circuit also has confused "antitrust injury" with *per se* illegality. *Lee-Moore Oil Co. v. Union Oil Co.,* 599 F.2d 1299, 1303 (4th Cir. 1979) ("[T]he rationale of *Brunswick* . . . may not be as readily applicable in cases which . . . charge *per se* violations of the Sherman Act") (footnote omitted).

[4]Examples of scholarly criticism of the *per se* illegality of such price fixing include Easterbrook, *Maximum Price Fixing,* 48 U. Chi. L. Rev. 886 (1981); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. Chi. L. Rev. 6 (1981); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, II,* 75 Yale L. J. 373 (1966).

Justice Harlan started the debate on the *maximum* aspect by arguing in his dissent in *Albrecht* that the vastly different economic effects of the two types of price fixing require that maximum price fixing be evaluated "on its merits, and not by incantation of a *per se* rule developed for an altogether different situation." 390 U.S. at 159. After this Court's landmark opinion in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977), the debate broadened to the appropriateness of *per se* treatment for any *vertical* price fixing, maximum or minimum. *Sylvania,* 433 U.S. at 70 (White, J., concurring) (the "effect . . . of the Court's opinion is necessarily to call into question" the *per se* rule against resale price maintenance). The Court, however, need not now review the correctness of those opinions holding maximum vertical price fixing *per se* illegal, because the Ninth Circuit "antitrust injury" decision is incorrect even under *Albrecht* and *Kiefer-Stewart.*[5]

[5]ARCO has not challenged the *per se* treatment of vertical maximum price fixing, because such a challenge was unnecessary to prevail on the antitrust injury issue and because this Court's opinions foreclosed such a challenge. The Court, unlike the District and Circuit Courts, can decide this issue if it believes that it now is necessary and appropriate to reverse its decisions that vertical maximum price fixing is *per se* illegal. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 697 (1984) (Court may consider questions not specifically passed upon by lower court or submitted as a question presented in petition for certiorari); *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (Court may consider important questions "not raised or resolved" in lower court in cases coming from federal courts).

The Court in *Kiefer-Stewart* identified the following single reason for holding vertical maximum price fixing *per se* illegal:

> "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

340 U.S. at 213. The Court in *Albrecht* quoted this language as the reason to "adhere" to the *Kiefer-Stewart* rule. 390 U.S. at 152. The *Albrecht* Court also expressed the same policy protecting dealers from price coercion by their suppliers with the following additional language:

> "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of *buyers* to compete and survive in that market. . . . Maximum prices may be fixed too low for the *dealer* to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price-fixing may channel distribution through a few large or specifically advantaged *dealers* who otherwise would be subject to significant nonprice competition."

390 U.S at 152-53 (emphasis added).[6]

[6]The *Albrecht* Court mentioned only one other policy justifying the *per se* rule: where the actual price is almost always the maximum price "the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 153. USA Petroleum cannot contend that its injuries reflect the anticompetitive effects of a minimum price-fixing conspiracy, because a conspiracy imposing a

Both opinions, therefore, based their holdings on the adverse effects on the defendants' coerced dealers. In both cases, the plaintiffs were dealers (present or former) of the defendants and the challenged conspiracies had as their purpose "to force [plaintiffs] to conform to" the defendants' prices. 390 U.S. at 149. Numerous opinions from the Courts of Appeal, including the Ninth Circuit, have recognized that the *per se* treatment for vertical price fixing is based upon the dealer's loss of "the freedom to set prices in accordance with his own judgment." *See, e.g., Chisolm Bros. Farm Equipment Co. v. Int'l Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

The dealer who is coerced to fix his prices suffers antitrust injury because his injury reflects the proscribed anticompetitive effect. *See, e.g., General Cinema Corp. v. Buena Vista Distribution Co.*, 681 F.2d 594, 596 (9th Cir. 1982) (dealer can recover damages resulting from loss of " 'price making autonomy' "). Indeed, the dealer alone suffers antitrust injury in a vertical maximum price fixing conspiracy, because it is the dealer's loss of pricing discretion (when he succumbs to his manufacturer's price coercion) that separates lawful price suggestion from unlawful vertical price fixing.[7] *See Bender v. Southland Corp.*, 749 F.2d 1205, 1212 & n.4 (6th Cir. 1984) ("Establishing a *per se* violation of the Sherman Act in a private action brought under a vertical price fixing theory requires proof [that] the defendant . . . coerced the plaintiff into charging higher or lower prices"; *Albrecht* "supports

floor on ARCO-brand prices would serve only to benefit it as a competitor. *Matsushita*, 475 U.S. at 583.

[7]Consumers suffer no antitrust injury because they benefit from the low prices resulting from nonpredatory *maximum* vertical price fixing.

the notion that coercion must be demonstrated in a private action brought under a vertical price fixing theory"); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1357 n.4 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972) (both holding that a supplier may suggest retail prices to its dealers and use "persuasion" to have those prices adopted, but may not coerce the dealer), *cert. denied*, 412 U.S. 493 (1973).

A competitor of the dealer does not suffer antitrust injury, because the antitrust rules are not designed to prevent the injury the competitor suffers as a result of having had to compete against the dealer's depressed prices unless, as discussed below, the prices are predatory. This is true at the most basic level because neither *Kiefer-Stewart* nor *Albrecht* cites as a reason for prohibiting vertical maximum price fixing a policy of protecting the coerced dealer's competitors. 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 346, at 250 & n.30 (1978) ("[T]he protection of the defendant's rivals is not the reason for prohibiting maximum resale maintenance [fn.: "This was not one of the grounds for the condemnation stated in the *Albrecht* case . . . . "]). Accordingly, the Ninth Circuit's decision here allowing private antitrust actions based upon such injuries, like the Third Circuit decision reversed in *Brunswick,* "divorces antitrust recovery from the purposes of the antitrust laws" and "would authorize damages for losses which are of no concern to the antitrust laws." *Brunswick,* 429 U.S. at 487.

Similarly as in *Brunswick,* USA Petroleum has not suffered antitrust injury because even in those circumstances (if any) where it proves successful price *coercion* of ARCO dealers it "would have suffered the identical 'loss' — but no compensable injury — " from low prices

that resulted simply from ARCO's lawful granting of discounts combined with successful *persuasion* of its dealers to lower prices. *Brunswick,* 429 U.S. at 487. USA concedes that the gravamen of its complaint is that ARCO subsidized through lower wholesale prices a "price-war" that the ARCO dealers otherwise "could not charge absent ARCO's subsidy." *See, e.g.,* USA Petroleum's Reply Brief in the Ninth Circuit, at 1. USA Petroleum's lost profits and sales resulted from the "subsidized" lower prices at competing ARCO stations. This loss was the same whether the ARCO dealer freely lowered his price as a result of ARCO's lower wholesale price to him or lowered his price only because he was coerced by ARCO. However, ARCO's actions violated Sherman Act § 1 (if at all) only where ARCO's efforts crossed the line that separates lawful suggestion and persuasion from unlawful coercion. Under this Court's existing law, a finding that ARCO crossed that line and "cripple[d] the freedom of [its dealers] and restrain[ed] their ability to sell in accordance with their own judgment" (*see Kiefer-Stewart,* 340 U.S. at 213) would entitle the dealers to sue to recover their injuries reflecting that restraint. However, USA Petroleum's injuries bear no relationship to the restraint, because they flow from the lawful "subsidy" and the resulting low retail prices and not from the coercion. Accordingly, as in *Brunswick,* they are "not of 'the type that the statute was intended to forestall' . . . " and therefore are not antitrust injury. 429 U.S. at 487-88.

Finally as in *Brunswick,* USA Petroleum's injuries resulted from increased competition, here represented by lower prices to consumers of gasoline. In *Cargill,* the Court reaffirmed, and extended to injunction actions under Clayton Act § 16, the holding in *Brunswick* that a plaintiff cannot prove antitrust injury where its damages result from increased competition brought about by an

antitrust violation, absent proof of predatory pricing. The Court there held that "a showing of loss or damage due merely to increased competition does not constitute" antitrust injury. 479 U.S. at 122.

Both *Brunswick* and *Cargill* involved mergers assumed to violate Clayton Act § 7. However, the antitrust injury requirement is based upon Clayton Act § 4, which applies to private actions for violation of any antitrust law. And, the Court's reasons for requiring predatory prices in those cases apply as well to any competitor antitrust action. Professors Areeda and Hovenkamp have acknowledged that the same principles apply as well to *per se* violations of the Sherman Act:

> "For example, imagine that physicians agree on their maximum prices, which the Supreme Court has condemned as *per se* unlawful because it tampers with the market or may be a disguised minimum. In addition, a maximum price fix can limit the provisions of services consumers desire. But suppose that a rival physician attacks the price- fixers and proves that he lost patients who shifted their patronage solely because the defendant physicians offered lower prices. Such injury-in-fact proximately caused by the illegal price fix is not antitrust injury, because protecting high price suppliers against lower priced competition desired by consumers is not an injury that the antitrust laws are designed to prevent, nor does it flow from the rationale for condemning maximum price fixing."

P. Areeda & H. Hovenkamp, *Antitrust Law* § 334.2c, at 305 (Supp. 1988). Indeed, Professors Areeda and Turner explicitly recognized that competitors do not suffer antitrust injury as a result of nonpredatory vertical maximum price fixing. 2 P. Areeda & D. Turner, *Antitrust Law* § 346,

at 249-50 (1978). As discussed below, the Seventh Circuit has reached the same conclusion.

II.

THE NINTH CIRCUIT DECISION HAS CREATED A CONFLICT BETWEEN THE CIRCUITS WHICH THIS COURT SHOULD RESOLVE BY HOLDING THAT A COMPETITOR'S LOSSES FROM VERTICAL MAXIMUM PRICE FIXING ARE NOT ANTITRUST INJURY

A. A Direct Conflict Exists Between The Circuits

For the reasons demonstrated above, the Seventh Circuit twice has held that a competitor's losses from vertical maximum price fixing do not amount to antitrust injury.

The first such opinion was *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984). Jack Walters was a building materials dealer who, along with other dealers, sold the defendant's prefabricated buildings. Jack Walters alleged that the defendant coerced its dealers to set lower prices for its buildings in violation of Sherman Act § 1 and that these lower prices injured Jack Walters, as a competitor of the coerced dealers. The court in an opinion by Judge Posner held that:

> "Even if what Morton did was price fixing, Walters could not challenge it. A private plaintiff can complain only of an antitrust injury. *Brunswick*. . . "
>
> ". . . In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no

suggestion that the lower prices would have been below cost; they would have been lawful prices.... [T]he loss to Walters from lawful price competition was a gain to consumers. *Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation.*"

737 F.2d at 708-09 (emphasis added).

In *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989), the Seventh Circuit applied the *Jack Walters* rule in a case indistinguishable in any pertinent respect from that presented here. Indiana Grocery operated 28 supermarkets in the Indianapolis area. Super Valu Stores, a wholesale and retail seller of groceries, granted one of its "Cub" franchise discount grocery stores to a competitor of Indiana Grocery. Price cutting by this Cub franchisee, subsidized by low wholesale prices from Super Valu, started a retail price war that allegedly cost Indiana Grocery profits and sales. Indiana Grocery brought an action under Sherman Act §§ 1 and 2, alleging respectively price-fixing and an attempt to monopolize. However, after conceding that the Cub franchisee's prices were not predatory, Indiana Grocery voluntarily dismissed its § 2 claim against Super Valu. The District Court then dismissed the § 1 claim on summary judgment on the ground that Indiana Grocery's lost profits and sales resulting from its competitor's nonpredatory prices set by vertical maximum price fixing did not constitute antitrust injury. 684 F. Supp. 561 (S.D. Ind. 1988). The Seventh Circuit affirmed, citing *Brunswick, Matsushita, Cargill* and *Jack Walters.* It specifically rejected the argument, "which in essence was recently accepted by [the] Ninth Circuit panel majority in" this

case, that antitrust injury can be presumed in a *per se* case from causation-in-fact. 864 F.2d at 1418. The Seventh Circuit characterized the Ninth Circuit majority's approach in this case as "stand[ing] the antitrust injury inquiry on its head." *Id.* at 1419 n.6.

The facts and procedural history of *Indiana Grocery* and this case are identical in all pertinent respects, except for the results in the Courts of Appeal. Without action by this Court, ARCO faces antitrust liability in a suit by its dealers' competitor for vertical maximum price fixing, while Super Valu does not. This difference results simply from the geographic location of the alleged price fixing, a fortuity which should not play such a determinative role in our national antitrust enforcement scheme. Moreover, as discussed more fully below, this difference has significance far beyond the impacts on the parties to these particular lawsuits.

B. The Ninth Circuit Rule Is Inconsistent With The Principal Purpose Of The Antitrust Laws, Which Is To Benefit Consumers

The Ninth Circuit rule does not create a new antitrust cause of action to which antitrust policy is simply indifferent. It creates a cause of action that is contrary to the fundamental purposes of the antitrust laws. The Court, therefore, should not allow the conflict to endure (and potentially to spread) but should promptly undo the Ninth Circuit rule.

The Court has recognized that consumers, not competitors, are the principal intended beneficiaries of the antitrust laws. In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), the Court quoted with approval Judge (then Professor) Bork's description of the Sherman Act as a "consumer welfare prescription." *See* R. Bork, *The Anti-*

trust Paradox 66 (1978). In *Brunswick,* the Court reaffirmed that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors'....*" 429 U.S. at 488, *quoting Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). The Court recently has described interbrand competition, because it results in lower prices to consumers, as "the primary concern of the antitrust laws...." *Sharp,* ___ U.S. ___, 108 S.Ct. 1515, 1521.

Following this Court's lead, the Courts of Appeal have identified consumer welfare as the principal objective of the antitrust laws.[8] Most significantly here, the courts have recognized the significance of consumer welfare to the antitrust injury inquiry. The Third Circuit in *Alberta Gas Chemicals,* 826 F.2d at 1241, stated the principle succinctly:

> "Mindful that antitrust law aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer ...."

[8] *See, e.g., Monahan's Marine, Inc. v. Boston Whaler, Inc.,* 866 F.2d 525, 527 (1st Cir. 1989) ("The Sherman Act's very purpose is to help consumers, in part by bringing about low, nonpredatory prices"); *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.,* 826 F.2d 1235, 1239 (3rd Cir. 1987) ("Conduct that harms competitors may benefit consumers — a result the antitrust laws were not intended to penalize"), *cert. denied,* ___U.S. ___, 108 S. Ct. 2830 (1986); *Brunswick Corp. v. Riegel Textile Corp.,* 752 F.2d 261, 266 (7th Cir. 1984) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process — which means ... to discourage practices that make it hard for consumers to buy at competitive prices — rather than to promote the welfare of particular competitors"), *cert. denied,* 477 U.S. 1018 (1985); *Murphy Tugboat Co. v. Crowley,* 658 F.2d 1256, 1259 (9th Cir. 1981) (the antitrust laws "do not prohibit non-predatory conduct that results in a lower price to consumers. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors"), *cert. denied,* 455 U.S. 1018 (1982).

The Seventh Circuit in *Ball Memorial Hospital, Inc. v. Mutual Hospitol Insurance, Inc.,* 784 F.2d 1325, 1334 (7th Cir. 1986), stated it more powerfully:

> "Whenever the plaintiff and consumers have divergent rather than congruent interests, there is a potential problem in finding 'antitrust injury.' ... When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust."

Nonetheless, the Ninth Circuit here created an antitrust cause of action the intended effect of which is to raise prices to consumers in order to redress and prevent injuries to a competitor. And, it did so in the face of unchallenged findings by the District Court that there is no probability of ARCO obtaining the market power necessary to raise prices in the future to supracompetitive levels. The Ninth Circuit's purported justification was to give competitors an ' "even playing field." ' 859 F.2d at 697. The Ninth Circuit thereby put the interests of competitors in higher profits ahead of the consumer interest in low prices. This decision totally ignored the recent guideposts of this Court and the Courts of Appeal.

This new category of private antitrust action threatens the consumer interest in low prices in another respect. The Court repeatedly has warned against the dangers inherent in antitrust actions based upon a competitor's low prices. For example, in *Matsushita,* 475 U.S. at 594, the Court warned that:

> "cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially

costly, because they chill the very conduct the antitrust laws are designed to protect."

See Cargill, 479 U.S. at 121 n.17; *Monsanto,* 465 U.S. at 763-64. The Court in *Sharp* recently applied that principle to avoid creating a *per se* violation where it would "be extremely difficult . . . to convince a jury" that the conduct at issue, even if competitive, was lawfully motivated:

> "Manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages. . . . "

108 S.Ct. at 1521.

Competitor antitrust actions based upon nonpredatory prices allegedly resulting from vertical maximum price fixing pose similar problems. The price-cutting they challenge is both the essence of competition and a real threat to inefficient competitors. As occurred here (and in *Indiana Grocery*), a competitor could attempt to fend off such competition with a lawsuit like this. Moreover, as USA Petroleum has contended in this case,[9] the competitor could contend that it can use as evidence of maximum price fixing (i) the manufacturer's "subsidization" of its dealers' lower prices by granting discounts, (ii) the manufacturer's suggestion of lower prices to its dealers and (iii) decreases in the dealers' prices following decreases in the manufacturer's wholesale prices. The threat of a competitor lawsuit easily could deter a manufacturer from engaging in this conduct, all of which is lawful[10] and procompetitive. *See 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 341-42 (1987) ("Our recent decisions recognize the possibility that a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition"). The Court should announce a nationwide antitrust injury rule that precludes competitor actions for nonpredatory vertical maximum price fixing in order to avoid any deterrence of this procompetitive conduct.

[9] USA Petroleum responded more than two years after it filed its complaint to an Interrogatory seeking all facts and witnesses supporting its contention that ARCO engaged in vertical price fixing, as follows:

> "USA has thus far based its contentions relating to the retail price maintenance conspiracy alleged in the complaint upon the inferences reasonably drawn from the pattern of ARCO's pricing conduct and the competitive price allowances given by ARCO to its dealers, that there was an agreement that the dealers to whom the allowances were given would lower their prices to undercut or meet the prices of independent dealers within the same ARCO pricing zones and that the allowances inevitably and inexorably caused them to do so. USA executives, particularly Mark Conant, were made aware by field personnel that ARCO stations were systematically pricing their gasoline below the prices of USA and other independents on an apparently fixed margin basis, keyed directly to the prices charged by the independents and apparently without regard to the ARCO dealers' costs or profits from such sales. Based upon the accumulated knowledge and experience of USA management that the major oil companies are able to and do induce and/or coerce their dealers to follow suggested prices, USA concluded that there was an express or implied understanding and conspiracy that the competitive price allowances being offered by ARCO were provided for the purpose and with the effect of having dealers set prices which would eliminate independents from the market."
>
> "USA is continuing to investigate and seek discovery of information related to its claims and continues to reserve the right to prove conspiracy and damages by any legally sufficient method that the evidence may support."

(CR 84:47-48.)

[10] *See* pp. 17-18 above.

Of course, the Court can allow an action by a competitor who can prove that the fixed price ceilings that injure him are predatory, because such an action coincides with the interests of consumers. Predatory prices, by definition, could result in the "elimination of competition" and in the creation and maintenance of " 'monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.' " *Cargill*, 479 U.S. at 118 & 121 n.17. However, any exception for predatory price fixing is inapplicable here because the District Court found that the challenged prices are not predatory, and USA did not challenge that finding on appeal. *See* 859 F.2d at 703 (Alarcon, J., dissenting).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

April 7, 1989.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

USA PETROLEUM COMPANY,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

No. 87-5681

D.C. No.
CV 83-3508-WPG

OPINION

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
November 4, 1987 — Pasadena, California

Filed October 7, 1988

Before: Arthur L. Alarcon, Dorothy W. Nelson and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Alarcon

COUNSEL

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OPINION

REINHARDT, Circuit Judge:

USA Petroleum Company (USA) sued Atlantic Richfield Company (ARCO) for violations of the Sherman Act, the Robinson-Patman Act, the Cartwright Act, and various state laws. USA subsequently voluntarily withdrew with prejudice its claim under section 2 of the Sherman Act. ARCO moved for summary judgment on USA's claim under section 1 of the Sherman Act, 15 U.S.C. § 1, and the district court granted its motion. The court entered judgment for ARCO under Fed.R.Civ. P.54(b), and USA timely appealed. We reverse.

I.

ARCO is an integrated oil company which, among other things, markets gasoline in the western United States. It sells gasoline to consumers both directly and indirectly through ARCO-brand dealers. USA is an independent marketer of gasoline, which it sells at retail under the brand name USA. USA competes directly with ARCO dealers at the retail level.

USA alleges that ARCO conspired with retail service station dealers selling ARCO-brand gasoline to fix retail prices at below-market levels. USA alleges that "ARCO's strategy was to eliminate the independents by fixing and subsidizing below-market prices and siphoning off the independents' volumes and profits," and that it succeeded in that strategy. According to USA, many independents have been driven out of business. ARCO's subsidies consisted of temporary volume allowances, temporary competitive allowances, and other price allowances extended to its distributors and dealers.

For the purpose of reviewing the district court's summary judgment order, we must assume these allegations to be correct. *See Baker v. Department of Navy,* 814 F.2d 1381, 1382 (9th Cir. 1987).

The district court ruled that "[e]ven assuming that [USA] can establish a vertical conspiracy to maintain low prices, [it] cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned . . . no such showing can be made." We disagree.

II.

[1] The question on appeal is whether in the absence of proof of predatory pricing a competitor can recover damages because of a maximum resale price maintenance agreement. Specifically, we must decide whether a competitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of "antitrust injury". This is a difficult question, and one of first impression in this circuit. The Supreme Court has not spoken on this issue, and among the circuit courts only the Seventh Circuit has taken a position. *See Jack Walters & Sons Corp. v. Morton Building, Inc.,* 737 F.2d 698 (7th Cir. 1984), discussed below. The question requires us to look closely at the purposes and policies underlying the antitrust laws, and to determine which application of the doctrine of "antitrust injury" best implements those purposes and policies.

[2] The concept of "antitrust injury" was put forward in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977):

> We therefore hold that for plaintiffs to recover treble damages . . . they must prove more than injury

> causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

In *Brunswick*, the plaintiffs argued that an illegal merger had kept alive failing competitors. The claim was that a violation of the antitrust laws had prevented the plaintiffs from obtaining monopoly profits. The Supreme Court's decision was not surprising: a plaintiff should not be able to claim damages for being unable to gain a monopoly position, the type of advantage the antitrust laws were meant to prevent. *See id.* at 487-88. The Court held that when the injury claimed "was not of 'the type that the statute was intended to forestall,'" damages under section 4 of the Clayton Act would not be available. *Id.* (quoting *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)).[1] *See Orion Pictures Distribution Corp. v. Syufy Enters.*, 829 F.2d 946, 948-49 (9th Cir. 1987) (no antitrust injury where the injury claimed was caused by a breach of contract, not by the alleged antitrust violation).

[1]One commentator summarized the holding of *Brunswick* as follows:

> Even if the plaintiff can show an antitrust violation, courts should allow treble damages only for injuries reflecting a disruption of competition in the plaintiff's market. From this perspective, *Brunswick* was an easy case. The plaintiffs may well have shown a violation of § 7 — the mere possibility that a large firm active in many markets will cut prices or use other monopolization tactics in a new market is enough to show a § 7 violation — but they failed to show that their losses stemmed from the realization of this possibility. The defendant had merely kept afloat businesses that otherwise would have failed. It had not affected prices in any way. The "lost profits" the plaintiffs complained of were the result of the very situation that the antitrust laws are supposed to encourage — free competition among as many firms as a market can support.

Note, "Antitrust Standing, Antitrust Injury, and the Per Se Standard", 93 *Yale L.J.* 1309, 1320 & n.58 (1984).

III.

To determine whether the injury USA alleges is of the type the antitrust laws were meant to prevent, we must look first to the Supreme Court's discussions of price fixing under the antitrust laws.

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 151 (1940), a case involving horizontal price fixing, the Supreme Court held that price-fixing agreements were *per se* illegal. The Court responded as follows to the argument that the fixing of prices should be legal if the prices fixed were reasonable:

> The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such

> schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.

Id. at 221. To the argument that the prices had been fixed in such a way as to stabilize the market, the Court stated:

> [I]n terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.
>
> . . .
>
> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*
>
> . . .
>
> Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

Id. at 223, 225-26 n.59.

[3] The Supreme Court in a later case thought it evident that the rule that price fixing was *per se* illegal extended to the fixing of maximum prices.

> The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*"

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

Kiefer-Stewart involved both a vertical maximum price fixing (maximum resale price maintenance) agreement and a horizontal agreement among competitors to impose that price restraint. *Id.* at 212. When the issue of vertical maximum price-fixing was more directly raised, the Supreme Court affirmed that that form of market manipulation was covered by the *per se* rule against price fixing.

> We think *Kiefer-Stewart* was correctly decided and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single

product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices. It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968) (footnote omitted).[2]

[2]The establishment of a *per se* rule against maximum vertical price fixing is more than merely a recognition that the anticompetitive effects of the practice outweigh the procompetitive effects. Dissent at 12723 n.1. Rather, it is a recognition that "such [procompetitive] cases are not sufficiently common or important enough to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549, 2557 n.16 (1977). Indeed, "*per se* rules are appropriate only for conduct that is manifestly anticompetitive, that is conduct that would always or almost always tend to restrict competition and decrease output." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988) (internal quotes and citations omitted).

In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court refused to withdraw maximum price fixing from the *per se* rule.

> Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal — even if not economic — footing as agreements to fix minimum or uniform prices. The per se rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition."

Id. at 348 (brackets in *Maricopa County*) (quoting Rahl, "Price Competition and the Price Fixing Rule — Preface and Perspective", 57 *Nw. U.L. Rev.* 137, 142 (1962)) (footnote omitted). It is clear that maximum resale price maintenance remains *per se* illegal.[3]

With this in mind, the dissent's flat assertion, based on Professor (now Judge) Easterbrook's neo-classical economic views, that "[m]aximum vertical price fixing lacks the potential anticompetitive effects that maximum horizontal price fixing has, and in contrast has the potential for creating a competitive benefit" is simply irrelevant. Dissent at 12725-26 (citing Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n.20 (1981)). To the extent that the Supreme Court's view of this issue differs from Judge Easterbrook's, we are required to apply the former.

[3]Recently, in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the Solicitor General and a number of other *amici* asked the Supreme Court to reconsider the inclusion of resale price maintenance within the *per se* rule. The Court declined to do so. *Id.* at 761-62 n. 7; *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988) (reaffirming the *per se* illegality of vertical price agreements).

III.

We also look to the legislative history of the antitrust laws for guidance. Professor Eleanor Fox has summarized the findings of historians as follows:

> As history teaches, "efficiency" is not the reason for antitrust. Indeed, those who valued efficiency more than competition opposed antitrust bills on grounds that they would constrain some activity that might save costs for a producer and forbid some activity that does not interfere with optimal allocation of resources. Rather than standing for efficiency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interest of consumers have been a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.

Although the dissent disclaims taking any position on whether maximum vertical price fixing should any longer be *per se* illegal, dissent at 9 n. 5, it is almost impossible to read the opinion's lengthy discourse of the benefits of this practice as saying anything else. It claims that ARCO's competitors are not harmed by its conduct, and that its consumers will only benefit. Yet, as discussed in Part III of this opinion, the Supreme Court has established *per se* rules against certain conduct only "for conduct that is manifestly anti-competitive, that is conduct that would always or almost always tend to restrict competition. . . . " *Business Elecs. Corp.*, 108 S. Ct. at 1519 (internal quotes and citations omitted).

> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity of enterpreneurs): competition as process. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair.

Fox, "The Modernization of Antitrust: A New Equilibrium", 66 *Cornell L. Rev.* 1140, 1152-54 (1981) (footnotes omitted); *see* R. Hofstadter, "What Happened to the Antitrust Movement?", in *The Paranoid Style in American Politics and Other Essays* 188, 199-200 (1965).

Price-fixing of any kind distorts in a basic way the competitive process the antitrust laws were meant to protect. Two prominent commentators have described vertical price fixing as follows:

> [S]uccessfully maintained vertical price fixing is often the expression of economic power based on market imperfections, imbalances in bargaining power, or the presence of some level of oligopoly-like power due to trademarks or product differentiation. As such, vertical price fixing directly interferes with the freedom and opportunity of retail competitors to compete on the merits and usually results in higher prices to consumers. It enables the proponent of a restraint to assert an absolute property right and to suppress distributor competition on price, denying the right of independent distributors to succeed or fail on the competitive merits.

Flynn & Ponsoldt, "Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes", 62 *N.Y.U.L. Rev.* 1125, 1148 (1987).

The Supreme Court cases echo the historians' conclusions regarding the objectives of the antitrust laws. The Court states that the rules against price fixing have a number of objectives, including the protection of the competitive process. Congress intended that market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail. *See, e.g., Socony*, 310 U.S. at 221, 223, 225-26 n.59; *Kiefer-Stewart*, 340 U.S. at 213 (price fixing conspiracies "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"); *Albrecht*, 390 U.S. at 152-53 (price fixing conspiracies "severely intrude upon the ability of buyers to compete and survive in [the] market"); *Maricopa County*, 457 U.S. at 348 ("The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' ") (quoting Rahl, "Price Competition and the Price Fixing Rule — Preface and Perspective", 57 *Nw. U.L.Rev.* 137, 142 (1962)). When sellers conspire to fix prices, the market mechanism is distorted: prices may be driven higher,[4] some goods and

[4]The dissent's contention that maximum vertical price fixing is "less destructive than minimum price fixing because it generally results in lower prices to consumers," Dissent at 12725-26, is questionable at best, but in any event simply irrelevant. Both violations are classified as *per se* because the resulting harm to competition is extremely serious. Moreover, the Ninth Circuit case the dissent cites for its proposition, *Northwest Publications Inc. v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985), simply does not say what the dissent says it does. Although we did note that these restraints *"arguably* benefit consumers," *id.* (emphasis added), we also enumerated some of the reasons, as we do above, why the Supreme Court still holds that "maximum price-fixing is as pernicious as minimum price-fixing." *Id.* We discuss below our views of the other case the dissent cites, *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

services may not be offered, and sellers may succeed or fail for reasons other than their ability to respond to the demands of the market. Rules against price-fixing are thus meant to prevent harm to both consumers and to sellers.

The "antitrust injury" standard requires us to determine whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused by the defendant's antitrust violation. *See generally* Note, "Antitrust Standing, Antitrust Injury, and the Per Se Standard", 93 *Yale L.J.* 1309 (1984). In the present case the inquiry seems straightforward: USA's claimed injuries were the direct result, and, indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries.

[4] ARCO argues that USA, as ARCO's competitor, cannot claim an antitrust injury, because injury to competitors is not the type of injury that the rule against maximum resale price maintenance was meant to prevent — at least in cases where predatory pricing is not alleged.[5] ARCO's argument misconceives the Supreme

[5]In essence, this is also the position the dissent takes. "Maximum vertical price fixing is destructive when the prices set are predatory." Dissent at 12726-27 (citing *Matsushita*, 475 U.S. at 584). However, the *Court* in *Matsushita* did not comment on whether maximum vertical price maintenance is destructive in the absence of predatory

Court's analysis. The Supreme Court has not discussed maximum resale price maintenance as a separate type of antitrust violation, but only as one form of price fixing. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 348; *Albrecht v. Herald Co.*, 390 U.S. at 152-53. Thus, the proper question is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent. The Supreme Court has indicated that the *per se* rule against price-fixing is aimed at the long-term as well as the short-term effects such practices have in the market, and not merely the immediate consequences for prices. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S.Ct. 1515, 1519-20 (1988) (characterizing interbrand competition as the primary concern of antitrust law, and listing "the creation and maintenance of small businesses" as one of its objectives). The removal of some elements of price competition distorts the markets, and harms all the participants: those retailers which have lost their ability to set prices, the other retailers in the same market who are harmed by the distorted market, and the consumers. Even if we were to analyze the question at the more specific level of maxi-

pricing. That issue was simply not before the Court or considered by it.

The dissent's position would preclude a finding of a violation of the antitrust laws in the case of the vast majority of unlawful maximum resale price agreements — i.e., those not accompanied by predatory conduct. No one, except an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement, would have standing to bring suit to challenge conduct which undeniably is forbidden by the antitrust laws. This would virtually amount to a finding that *Brunswick* has, *sub silentio*, overruled *Albrecht*, *Kiefer-Stewart*, and *Maricopa County*. P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 335.2(i), at 277 n.56 (1987 Supplement).

mum resale price fixing, given the long-term consequences of that practice we would reach the same result for similar reasons.

ARCO relies in part on *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S.Ct. 484 (1986). That reliance is misplaced. In *Cargill*, plaintiff, a large beef-packing firm, sought injunctive relief to enjoin the merger of the second and third largest beef-packing firms in the industry. The plaintiff asserted that the defendant would be able to lower its prices due to "multiplant efficiencies". *Id.* at 491. This would require plaintiff in turn to lower its prices, thus lowering its profits. *Id.* at 492. The Supreme Court held that this injury did not constitute "antitrust injury"; the Court relied in part on the fact that plaintiff had not shown that the defendant had engaged or would engage in unlawful or predatory pricing. *Id.* at 492-94. In other words, in *Cargill* the plaintiff failed to show that the pricing practices that it claimed was causing or would cause its injuries were illegal.[6] In fact, the Court termed the defendant's pricing policies "vigorous competition" and said that the antitrust laws protect small business "only against the loss of profits from practices forbidden by [those] laws." *Id.* at 492. In the present case, plaintiff's injuries result directly from pricing practices that

[6]For a single firm's pricing practices to violate the antitrust laws, that firm must be engaged in predatory pricing or discriminatory pricing (the Robinson Patman Act, 15 U.S.C. § 13(a)). However, much less need be shown to assert that the pricing practices of two or more firms have violated the antitrust laws: it need only be shown that those firms have conspired to fix prices. *See generally* H. Hovenkamp, *Economics and Federal Antitrust Law* 92-124, 159-61, 172-73, 258-65 (1985). Here, a price-fixing agreement between ARCO and its dealers is alleged.

defendants admit (for the purpose of this appeal) are forbidden by the antitrust laws and are therefore illegal.[7]

In *Cargill*, as in Brunswick, the connection between the antitrust violation and the activity which caused the alleged injury is attenuated or indirect. In those cases, the violation was a merger or an acquisition, and the injury occurred because of pricing practices which were themselves legal.[8] As the Court held, injuries derived from legal pricing practices are not necessarily the type of injuries rules against certain types of mergers and acquisitions were meant to prevent. *See Cargill*, 107 S. Ct. at 492-93; *Brunswick*, 429 U.S. at 486-88.

IV.

ARCO claims that USA does not have standing under the "antitrust injury" standard because maximum resale price maintenance increases rather than decreases competition.[9] Maxin m resale price maintenance brings prices lower, not higher. If competitors fail, it is because they are not able to match the low prices charged by the

[7]There is another reason why *Cargill* is not dispositive. The law against monopoly involved in *Cargill*, section 7 of the Clayton Act, attempts to prevent market structures in which the competitive process is vulnerable to distortion. The distortion is only potential. In price-fixing cases, by contrast, the distortion of the price mechanism has, by definition, already occurred.

[8] This characterization applies equally well to *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3rd Cir. 1987), *cert. denied*, 56 U.S.L.W. 3843 (U.S. June 13, 1988). In *Alberta Gas*, plaintiff claimed that defendant's acquisition of a company caused the acquired company to cancel a project. Because the project was canceled, the acquired company bought less of plaintiff's product. The court found that the plaintiff had not shown antitrust injury. This, too, is an unsurprising finding: the connection between violation and injury is too attenuated for the plaintiff to claim, without more, that the injury involved is of the type the particular antitrust rule was meant to prevent.

[9] ARCO relies on ***Murphy Tugboat Co. v. Crowley***, 658 F.2d 1256 (9th Cir. 1981), heavily, and the dissent does so equivocally, recognizing that the case is not controlling. In fact, ***Murphy Tugboat*** is wholly inapplicable. In ***Murphy Tugboat***, one tugboat company complained of the low fees charged by another tugboat company for the services of its licensed inland pilots. These lower fees were the result of a labor agreement entered into between the inland pilots and one of the defendants. Because the plaintiff was not a competitor in the area covered by the labor agreement, the legality of that agreement was irrelevant to our principal inquiry. In any event, we ultimately held that the agreement was valid. *Id.* at 1259. As a result, the plaintiff's claim depended entirely on whether the defendants' "overall pricing policies constitute[d] anticompetitive conduct." *Id.* at 1259. With the labor agreement, and thus the price-fixing allegation removed from the case, an antitrust violation could only be demonstrated by proof of a predatory pricing scheme. This is in stark contrast to the present case, in which the defendant's unlawful price-fixing is (for the purpose of the summary judgment motion) conceded and thus an antitrust violation is established without any need to show predatory pricing.

As the dissent points out, we did state in ***Murphy Tugboat*** that "[the anti-trust laws] do not prohibit non-predatory conduct that results in a lower price to the consumer." Dissent at 12728-29. However, the dissent ignores the crucial fact that, in ***Murphy Tugboat***, predatory pricing was a necessary element because, in the absence of such conduct, there was no *violation* of the antitrust laws. (It also fails to mention that ***Murphy Tugboat*** was not a maximum resale price case and did not purport to discuss the role of predatory conduct in such cases.) It was in connection with our discussion of whether a *violation* had occurred that we made the statement that the dissent now lifts wholly out of context — the statement that the antitrust laws do not protect inefficient businessmen against others who establish lower prices but do not engage in predatory conduct. Here, however, we are not seeking to determine whether a *violation* of the antitrust laws occurred. For our purposes, there is a *conceded violation* of those laws; specifically, it is agreed that a violation

maximum resale price maintenance retailers. This is a typical cost of competition, according to ARCO, and not a problem for antitrust policy. ARCO relies heavily on the argument that the antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). However, we have earlier discussed the problems with misreading that aphorism:

> The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

occurred in the absence of predatory pricing. The only question here is whether there is a cognizable injury.

In short, *Murphy Tugboat* deals solely with the issue of when a plaintiff who is not the defendant's competitor in the area in question may claim that an antitrust violation has occurred. The question of when a plaintiff who *is* a competitor can prove "antitrust injury" is the basic issue in the present case. Indeed, it is worth noting that the Seventh Circuit did not consider *Murphy Tugboat* sufficiently on point to mention it when it considered the same question now before this court — whether competitors have antitrust injury *standing* in maximum resale price cases. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984).

Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1988).[10]

[5] We reject ARCO's characterization that USA's injury resulted from "*increased*, not reduced . . . competition," as contrary to the antitrust laws. As in the terms of the Robinson-Patman Act, 15 U.S.C. § 13(a), the success of some firms and the failure of other firms, when due to illegal pricing practices, must be characterized as a "lessen[ing] [of] competition", not an increase in competition. Also, when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced service to consumers. *Cf. Albrecht*, 390 U.S. at 152-53; *Socony-Vacuum*, 310 U.S. at 221.

[6] We note that commentators with a particular economic viewpoint have argued that maximum resale price maintenance should not be a *per se* violation of the antitrust laws.[11] However, we cannot ignore the fact that maximum resale price maintenance is *per se* illegal, simply because some might think that rule is unwise or because of commentators' speculation that the rule's de-

[10] See Flynn & Ponsoldt, *supra*, at 1126 n.4 (citation omitted):

> One of the more popular cliches is that the antitrust laws protect competition, not competitors. The cliche implicitly asserts that one can have competition without competitors, contains no definition of "competition," and is frequently used to deny the congressionally defined goals of antitrust policy in favor of the narrow goals assumed by the neoclassical model.

[11] *See, e.g.*, Blair & Fesmire, "Maximum Price Fixing and the Goals of Antitrust", 37 *Syracuse L. Rev.* 43 (1986); H. Hovenkamp, *Economics and Federal Antitrust Law* 247-72 (1985); Easterbrook, "Maximum Price Fixing", 48 *U. Chi. L. Rev.* 886 (1981); R. Bork, *The Antitrust Paradox* 280-98 (1978).

mise might be in sight. *See Northwest Publications, Inc., v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985); *cf. Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 707, 709 (7th Cir. 1984). The Supreme Court has clearly stated — and restated — that maximum resale price maintenance, as a form of price fixing, is *per se* illegal, and that rule binds us until the Court or Congress[12] clearly states otherwise. USA alleges that ARCO's price-fixing had the objective of forcing independent gasoline retailers from the market, and that ARCO had been largely successful in that objective. In its complaint, USA states that "more than a dozen large independents have sold out, liquidated or drastically curtailed their operations and many independent retail stations have been closed." It also states that the barriers to entry into the retail gasoline market have been heightened so that "once an independent is eliminated, it is highly unlikely that it will be replaced." The objective and effect of ARCO's illegal pricing scheme has been to reduce the number of independent gasoline retailers, in other words, to reduce competition. USA complains that it has suffered financial losses and is being driven out of the market by ARCO's illegal price-fixing. This is the type of injury that the antitrust rules were meant to prevent.

Finally, we consider the Seventh Circuit's treatment of the issue. In *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), Walters, a building-materials dealer, was a distributor of goods produced by Morton, a manufacturer of prefabricated farm buildings. Walters claimed, among other things, that Morton had coerced its dealers, including Walters, to maintain a conspiracy to maintain maximum resale prices. *Id.* at 706.

[12]*See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 769 (1984) (Brennan, J., concurring).

The district court dismissed Walters' claims, and the Seventh Circuit affirmed. Regarding the maximum resale price maintenance, Judge Posner, writing for the court, concluded that Walters had not shown antitrust injury:

> In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. . . . Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust injury.

Id. at 709.

We disagree.[13] The antitrust laws were, as we discussed earlier, intended to give entrepreneurs and independent distributors an "even playing field." The competitive pro-

[13]As one commentator has noted:

> Even consumers would not be able to bring actions under the rule established in Judge Posner's opinion in *Jack Walters & Sons Corp. v. Morton Building*. . . .
>
> . . . I cannot escape the conclusion that Judge Posner — growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht* — has decided to undertake that task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. The per se rule against resale price maintenance is definitely not among them. That fact justifies arguments, both theoretical and political. But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

cess can only rule when participants in the process are not allowed to combine to fix prices ahead of time.[14] We conclude that the purposes and policies of the antitrust laws are best effectuated by recognizing the "standing" of competitors to enforce the antitrust laws against price-fixing conspiracies. To put the same point differently, we conclude that the injury done to the market and to competitors by price-fixing conspiracies is antitrust injury — the type of injury the antitrust laws were meant to protect.[15]

Hovenkamp, "Chicago and Its Alternatives", 1986 *Duke L.J.* 1014, 1025-26 (footnote omitted).

[14]*Cf.* Flynn & Ponsoldt, *supra*, at 1149:

> [A conspiracy to fix prices] is a direct displacement of the competitive process of price determination. It is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing — a denial of rights guaranteed by the goals of antitrust policy. Congress did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

[15]We recognize that our decision conflicts with that of the Seventh Circuit. In *U.S. v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987), we said "absent some good reason to do so, we are disinclined to create a direct conflict with another circuit." We did not intend by that statement to surrender our authority to decide important issues of first impression or to suggest that we would adopt the view of the first circuit to consider such issues in every instance. Rather, we meant that we would give respectful attention to the views of the other circuit and carefully evaluate that circuit's analysis before settling on ours. Here we have done so and we find good reason to disagree with the result reached by Judge Posner.

For the reasons stated above, we reserve the decision of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

ALARCON, Circuit Judge, dissenting:

I.

In this antitrust action, plaintiff/appellant USA Petroleum Company ("USA") appeals from the district court's order granting summary judgment in favor of defendant/appellee Atlantic Richfield Company ("ARCO") for USA's failure to demonstrate "antitrust injury." I respectfully disagree with the majority's conclusion that the district court erred. Because USA failed to present any facts showing antitrust injury, I would affirm.

II.

USA, a gasoline retailer, brought this action to challenge ARCO's marketing program in which ARCO discontinued its credit cards and offered lower gasoline prices to consumers. USA claimed ARCO, a major integrated oil company, violated section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), by conspiring with certain retail dealers to set retail prices for ARCO-brand gasoline at levels USA could not match. USA claimed ARCO violated section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), by attempting to monopolize the retail gasoline market through the "predatory pricing" of its ARCO-brand gasoline. USA also asserted claims for violations of the Robinson-Patman Act, the Cartwright Act and various state laws.

USA claimed ARCO's increased price competition resulted in it having "lost sales it otherwise would have

made." USA sought compensation for these lost sales under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), which provides, in part, "[a]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained."

ARCO moved for summary judgment on USA's sections 1 and 2 claims. ARCO contended USA's section 2 claim failed for no "dangerous probability" existed that ARCO-brand sellers would monopolize the market. ARCO contended USA's section 1 claim failed for want of antitrust injury. ARCO contended the injury USA described in its complaint was not antitrust injury because it resulted solely from non-predatory price competition.

In response to this motion, USA voluntarily dismissed its section 2 claim. Thereafter, ARCO renewed its motion concerning USA's section 1 claim. The district court held that, even assuming a vertical conspiracy to fix maximum prices, USA "cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing . . . [the prices charged for ARCO gasoline] to be predatory." The court found those prices were not predatory. Accordingly, it granted ARCO's motion and dismissed USA's complaint with prejudice.

III.

USA claims the district court misapplied the substantive law when it concluded the injury USA suffered as a result of the alleged price-fixing conspiracy was not antitrust injury, i.e. "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1977). USA contends it suffered antitrust injury because its injury resulted from an illegal price-fixing conspiracy.

We review independently and non-deferentially a contention that the district court misapplied the substantive law in its order granting summary judgment. *Ashton v. Cory,* 780 F.2d 816, 818 (9th Cir. 1986). We view the evidence in the light most favorable to USA, the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Baker v. Department of Navy,* 814 F.2d 1381, 1382 (9th Cir.), *cert. denied,* 108 S. Ct. 150 (1987).

IV.

The issue presented on this appeal is a difficult question of first impression. We are asked to determine whether a retail competitor suffers antitrust injury in the form of lost profits as a result of a non-predatory maximum vertical price fixing agreement. We must assume for purposes of this appeal that USA could prove a *per se* violation of Sherman Act § 1 for maximum vertical price fixing. However, as the Supreme Court in *Matsushita* instructs, " . . . [USA] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct." 475 U.S. at 586.

The concept of antitrust injury had its origins in the Supreme Court's decision in *Brunswick,* 429 U.S. 477. In *Brunswick,* the plaintiff bowling alley operators brought a treble damage action under section 4 of the Clayton Act against a competing bowling alley operator. Plaintiffs claimed their competitor's acquisition of several bowling alleys in the proximity of their operation violated section 7 of the Clayton Act inasmuch as it threatened to "create a monopoly." *Id.* at 480. To establish damages, the plaintiffs demonstrated that had the competitor not acquired the alleys, those alleys would have closed and

plaintiffs' profits would have increased from the resultant reduction of competition.

The Supreme Court held that plaintiffs seeking treble damages under section 4

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 488-89 (emphasis in original). Applying this principle, the Court held the plaintiffs' claim failed for their injury resulted solely from preservation of competition. An injury suffered on account of preservation of competition, according to the Court, is not one the "antitrust laws were intended to prevent." *Id.* at 488.

V.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982) provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Price fixing agreements, whether they set minimum or maximum prices or whether they are horizontal or vertical agreements, are all deemed *per se* violations of Sherman Act § 1 despite the fact that some types of price fixing agreements may have competitive benefits. *See e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720, 724 (1987) (minimum vertical price fixing); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (horizontal

maximum price fixing); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum vertical price fixing); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (vertical and horizontal maximum price fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (horizontal minimum price fixing). The *per se* rule is based in part on "economic prediction, judicial convenience, and business certainty." 457 U.S. at 354. Thus, "[a]s in every rule of general application, the match between the presumed and the actual is imperfect." *Id.* at 344. *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n. 16 (1977) ("cases that do not fit the generalization may arise"). Because the match between the conduct and the rule may be imperfect, it follows that some conduct which does not fit the reason for finding an antitrust violation may not result in antitrust injury or may result in only limited antitrust injury.[1]

The majority states that the proper question is not "what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent." Maj. op. at 12. This inquiry ignores the *Brunswick* re-

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[1]USA asserts that the *per se* rule conclusively presumes that maximum vertical price fixing is anticompetitive so it can never have any procompetitive consequences. On the contrary, the *per se* rule is a recognition that although price fixing agreements may have some procompetitive potential, the anticompetitive effects on balance outweigh the procompetitive aspects. *See Continental T.V., Inc.* 433 U.S. at 50 n.16. Antitrust injury analysis requires that the "injury" reflect the anticompetitive effect of the violation, not any procompetitive effects. *See Brunswick*, 429 U.S. at 488-89. For examples of antitrust violations without antitrust injury, *see Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469-1470 (1985); 2 P. Areeda & D. Turner, *Antitrust Law*, ¶¶ 345 & 346.

quirement that the injury reflect the anticompetitive effect of the violation. The anticompetitive effects will be different depending on the type of price fixing agreement. Thus, the Supreme Court instructs us that:

> The term "restraint of trade" in [Sherman Act § 1], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances.

Business Electronics Corp., v. Sharp Electronics Corp., — U.S. —, 108 S. Ct. 1515, 1523 (1988). Therefore, we must analyze "illegal price fixing agreements" to determine whether the agreement is horizontal or vertical *and* whether it sets maximum or minimum prices so we can properly determine the economic consequences and anticompetitive effects. This inquiry is necessary to determine whether an injury allegedly caused by "illegal price fixing" is of the type the antitrust laws were meant to prevent.

In general, horizontal price fixing agreements are illegal because they create market power that did not previously exist and this cooperative action among competitors creates a restraint that is otherwise not possible. 7 P. Areeda, *Antitrust Law,* ¶ 1437 (1986). In contrast, a vertical price restraint ordinarily does not increase anyone's market power but merely reflects existing power of one party in the marketplace. 7 P. Areeda, *Antitrust Law,* ¶ 1437 (1986). The impact of vertical price restrictions is to reduce or eliminate intrabrand competition[2] without

[2]Intrabrand competition involves competition among sellers of the same brand of the same product. *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 52 n. 19 (1977).

necessarily impacting interbrand competition.[3] *See Continental T.V., Inc.,* 433 U.S. at 51-52 (1977); Shores, *Vertical Price-Fixing And The Contract Conundrum: Beyond Monsanto,* 54 Fordham L. Rev. 377, 379 (1985). In contrast, horizontal price restraints drastically reduce interbrand competition. *See White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) (Brennan, J., concurring); *see also Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348 n. 18 (1982) ("horizontal restraints are generally less defensible than vertical restraints"); Shores, *supra* at 401. A reduction in interbrand competition causes more concern under the antitrust law, because interbrand competition is seen as the primary concern of the antitrust law. *Continental T.V., Inc.,* 433 U.S. at 52 n. 19.

The effect of minimum price fixing, whether horizontal or vertical, is generally higher prices. Pitofsky, *In Defense of Discounters: The No-Frills Case for A Per Se Rule Against Vertical Price Fixing,* 71 Geo. L. J. 1487, 1488 (1983); *324 Liquors,* 475 U.S. 335, 107 S. Ct. at 723. In addition, minimum vertical price fixing, unlike some other types of vertical restraints, is similar to horizontal price fixing because it restricts interbrand competition. *Continental T.V., Inc.,* 433 U.S. at 51 n. 18 *(citing White Motor Co.,* 372 U.S. at 268 (Brennan, J., concurring)).

Maximum price fixing, whether vertical or horizontal, is not viewed as being as destructive as minimum price fixing principally because it generally results in lower prices to consumers. *Northwest Publications, Inc. v. Crumb,* 752 F.2d 473, 475 (9th Cir. 1985); *accord Jack Walters & Sons Corp. v. Morton Building, Inc.,* 737 F.2d

[3]Interbrand competition involves competition between sellers of different brands of the same generic product. *Continental T.V., Inc.,* 433 U.S. at 52 n. 19.

698, 708-709 (7th Cir.) *cert. denied,* 469 U.S. 1018 (1984). Maximum horizontal price fixing is viewed as more anticompetitive than maximum vertical price fixing because of its potential to eliminate interbrand competition.[4] Maximum vertical price fixing lacks the potential anticompetitive effects that maximum horizontal price fixing has, and in contrast has the potential for creating a competitive benefit. *See* Easterbrook, *supra,* at 890 n.20.[5] Indeed, maximum vertical price fixing by a single manufacturer may stimulate interbrand competition.[6] *See 324 Liquor*

[4]For a discussion of the potential anticompetitive effects of maximum horizontal price fixing, *see* Easterbrook, *Maximum Price Fixing,* 48 U. Chi. L. Rev. 886, 900-908 (1981). Despite the potential anticompetitive effects of maximum horizontal price fixing, Easterbrook argues that the *per se* rule should be abandoned in the maximum horizontal price fixing case. *Id.*

[5]Because maximum vertical price fixing is viewed as having some pro-competitive benefits and because its economic effect is not very different from nonprice vertical restraints, *Continental T.V., Inc.,* 433 U.S. at 69 & n. 10, many commentators have argued that it should be analyzed under the rule of reason. Easterbrook, *supra* at 890 n.20; Pitofsky, *supra,* at 1490 n. 17; *cf. Vertical Price Fixing,* 98 Harv. L. Rev. 983 (1985); *see also, The Jeanery, Inc. v. James Jeans, Inc.,* 849 F.2d 1148, 1153 n.3 (9th Cir. 1988) (presenting, "[a]n abbreviated bibliography of this debate"). I also note that the Supreme Court was asked by the Solicitor General and other *amici* in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752 (1984), to reconsider whether vertical price restrictions should always be unlawful. The Supreme Court declined to reach the question because it had not been presented in the district court nor raised on appeal. 465 U.S. at 761 n. 7. Similarly, this argument was not raised in the case before us, and I express no opinion as to the merits of this argument.

[6]I note that the Supreme Court in dictum in *Business Electronic Corp.,* 108 S. Ct. at 1520 stated that "vertical price restraints reduce *inter*brand price competition." From the Court's citations it is clear that the Court was referring to *minimum* vertical price restraints. The Court cites *Continental T.V., Inc.,* 433 U.S. at 51 n. 18, which

Corp., 479 U.S. 335, 107 S. Ct. at 724 ("a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition") (emphasis in original). Maximum vertical price fixing is destructive when the prices set are predatory. *See Matsushita,* 475 U.S. at 584. Below cost prices are seen as predatory "chiefly in cases in which a single firm having a dominant share of the market, cuts its prices in order to force competition out of the market, or perhaps to deter potential entrants from coming in." *Id.* at 584 n.8. Thus USA's injury must be viewed in the context of the alleged antitrust violation to determine whether the alleged injury results from the *anticompetitive* aspects of the maximum vertical price fixing agreement.

quotes Justice Brennan's concurring opinion in *White Motor Co. v. United States,* 372 U.S. 253, 268 (1963) where he stated, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." Resale price maintenance has traditionally been used to refer to *minimum* vertical price fixing and was used by Justice Brennan in the context of a minimum vertical price fixing case. Similarly, the Court relies on Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum. L. Rev. 282, 294 (1975) in support of its comment. Again, Posner uses the term "resale price maintenance" to refer to minimum vertical price fixing. *See id.* at 292, n.36. Furthermore, Posner uses Justice White's quote to refer to the "rule of *Dr. Miles*" which was a minimum vertical price fixing case. *Id.* at 294. Posner criticizes the Court for not drawing a distinction between minimum and maximum vertical price fixing. *Id.* at 297.

VI.

The antitrust injury analysis in a maximum vertical price fixing agreement is difficult because, as one commentator states, "[s]upplier regulation of the *maximum* prices charged by dealers is virtually never anticompetitive." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 335.2h, n.56 (Supp. 1987); *see also* Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469-1470 (1985) (when price fixing agreements reduce prices and increase output, no harm from the practice can be antitrust injury); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 490-492 (1980). If the conduct is not anticompetitive, it follows that no antitrust injury exists.

The most common scenario involving a maximum vertical price fixing agreement involves a suit by dealers or distributors against their suppliers. The "restraint of trade" involved in a maximum vertical price fixing agreement between a supplier and its dealers is the elimination or drastic reduction of competition in the intrabrand market. Whether a coerced dealer in fact suffers antitrust injury by such an agreement would depend on the particular circumstances. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 346c (1978); *see e.g. Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-09 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (maximum vertical price fixing agreement did not result in antitrust injury to dealer); *cf. Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976) *cert. denied*, 433 U.S. 910 (1977) (pre-*Brunswick* case awarding terminated dealers lost profits).

A case like the one before us invoking an action by one competitor against its rival's supplier cannot be satisfactorily resolved by adopting the analysis of the dealer versus supplier cases. Although a plaintiff does not have

to "prove an actual lessening of competition in order to recover, . . . the case for relief will be strongest where competition has been diminished." *Brunswick*, 429 U.S. at 489 n. 14. Thus, the drastic reduction or elimination of competition in the intrabrand market suggests that antitrust injury is more likely to occur in the dealer-versus-supplier cases. Furthermore, the dealer-versus-supplier cases usually involve coercion and threats which impair a dealer's "freedom" to set prices.[7]

The closest case to the facts presented here is *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). In *Murphy Tugboat*, the plaintiff tugboat company sued a rival tugboat company for treble damages under section 4 of the Clayton Act. The plaintiff claimed that the rival tugboat company entered into a price fixing agreement with inland pilots which set the fees for the pilots' services at a level that was lower than the fees otherwise charged by pilots in the San Francisco area. *Id.* at 1258. The plaintiff tugboat company claimed the pilot fee agreement was anticompetitive because the rival's package price, which included the tugs and the pilot fees, was lower than it would have been absent the agreement. If the rival's package price was lower, the plaintiff would have been able to charge a higher price or maintain price and increase market share. *Id.* at 1257-58. The plaintiff claimed these lost profits as damages.

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[7]Although USA alleged that it was "forced" to match ARCO's prices, it is difficult to see how ARCO with only 17% of the gasoline market during its most successful month "forced" USA to match ARCO's prices when most of the market had set prices above those required by ARCO. It would appear instead that USA voluntarily chose to match ARCO's reduced price to remain competitive.

We stated in *Murphy Tugboat* that the plaintiff did not and could not complain about the pilot fee agreement because the plaintiff was not operating in the pilot services market. We held that the rival's package price did not violate Sherman Act § 1 because the package price, which was always higher than the plaintiff's price, was not below cost. Therefore, the package price was not predatory and the rival did not violate Sherman Act § 1. In reaching this conclusion we stated, "[the antitrust laws] do not prohibit non-predatory conduct that results in a lower price to the consumer. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors." *Id.* at 1259.

Murphy Tugboat is instructive, but it is not controlling because it differs from the present case in several important respects. First, the alleged price fixing in *Murphy Tugboat* did not exist in the plaintiff's tugboat market, it existed in the inland pilot market. Here, the alleged price fixing exists in USA's retail gasoline market. Second, in *Murphy Tugboat* the package price charged to customers was not fixed. Only one component cost of the package price (the pilot fee) was fixed. In contrast, USA alleges that ARCO fixed the gasoline price charged to retail customers, not that ARCO fixed some component cost of supplying gasoline.

My research has not disclosed a case in this circuit or in any other jurisdiction dealing with a competitor versus its rival's supplier which addresses the antitrust injury requirement of Clayton Act § 4 in the context of a maximum vertical price fixing agreement in violation of Sherman Act § 1.[8] Instead, I have found repeated affirmations

[8] *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) contains facts similar to the facts presented here. However, I do not find *King & King Enterprises* helpful because it did not discuss the antitrust injury requirement and it involved a horizontal conspiracy to fix maximum prices.

of the principle that the Sherman Act was designed by Congress as a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), and was not designed to insulate competitors from vigorous competition. *See Brunswick*, 429 U.S. at 488 *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) ("the antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*' ") (emphasis in original); *accord Triple M Roofing Corp. v. Tremco., Inc.*, 753 F.2d 242, 243 (2d Cir. 1985) ("[t]he antitrust laws were never intended to provide a balm for the hardships occasioned by vigorous competition"); *Matsushita*, 475 U.S. at 594 ("cutting prices in order to increase business often is the very essence of competition); *cf. Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 495 (1986) ("a plaintiff seeking injunctive relief under §16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury").

VII.

Turning to the facts before us, USA has alleged that ARCO conspired with its dealers to engage in maximum vertical price fixing to set prices below the market level.[9]

[9] USA has not alleged and no facts exist in the record to suggest that any maximum horizontal price fixing agreement was also in existence. Vertical price fixing agreements which also have a horizontal element cause concern because not only do they reduce or eliminate intrabrand competition, but they have the potential to eliminate or drastically reduce interbrand competition. *See Keifer-Steward Co. v. Seagram & Sons*, 340 U.S. 211 (1951).

The district court found ARCO's prices were not predatory,[10] and USA does not challenge this finding on appeal.

The impact of ARCO's alleged maximum vertical price fixing scheme would be to reduce or eliminate intrabrand competition among ARCO brand dealers without necessarily impacting interbrand competition.[11] Arguably, interbrand competition in the "discount gasoline" submarket[12] would be stimulated by ARCO's entry into the independent retailers' market niche. At the same time those gasoline dealers in the interbrand market who already were selling at prices higher than USA and ARCO may not have been affected by ARCO's alleged price fixing agreement. In any event, the essence of USA's claim is that one of the major oil companies, ARCO, intruded upon the independent retailers' market niche by under pricing the independent retailers. The result is lower prices to consumers, but less profit for USA. USA's loss of profits from ARCO's vigorous competition is not anti-

[10]For a claim of a conspiracy to engage in *predatory pricing* the Supreme Court has stated that a plaintiff does not suffer "antitrust injury unless petitioners conspired to drive [plaintiff] out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Matsushita*, 475 U.S. at 585 n.8. USA acknowledges that this standard is inapplicable to a conspiracy to engage in maximum vertical price fixing.

[11]*See* Allison, *An Analysis of the Vertical Price-Nonprice Dichotomy*, 21 Akron L. Rev. 131 (1987). Allison conducted a study of price and non-price vertical restraints. In ten out of the eleven cases he studied involving maximum vertical price fixing and no other restraints, only intrabrand competition was affected. *Id.* at 166, table 1.

[12]USA argued below that the discount gasoline submarket was a market separate from the retail gasoline market. The district court's findings established that no separate discount gasoline market existed.

trust injury.[13] The district court did not err in granting summary judgment in ARCO's favor on the basis of USA's failure to demonstrate antitrust injury.

USA attempts to avoid this result by reformulating the *Brunswick* test. USA misstates that test as inquiring whether ARCO's alleged *anticompetitive acts* were of the type the antitrust laws were intended to prevent as opposed to whether its *injury* was of the type the antitrust laws were intended to prevent. After reformulating the test, USA devotes the bulk of its efforts to demonstrate ARCO's alleged price-fixing activities were of the type the antitrust laws were intended to prevent. Having established this to its satisfaction, USA contends "[a]ll that remains . . . is that USA show that its claimed damages flow from the presumed market distorting effects." Since, according to USA, the question of "flow" is "necessarily a fact intensive inquiry," USA concludes that this court must remand this issue for jury-determination.

USA's reformulation of the *Brunswick* test transforms it into a simple question of causation. This mistaken notion directly contravenes *Brunswick*. The *Brunswick* court held plaintiffs seeking treble damages "must prove *more* than injury causally linked to an illegal presence in the market." *Brunswick*, 429 U.S. at 489 (emphasis added). As one commentator has persuasively stated using an example similar to the facts presented here,

> Even if causation is assumed, we must ask whether the plaintiff is entitled to be free of a rival product's lowered price that is entirely lawful apart from the

[13]According to the majority, as a result of price fixing, retail competitors are "harmed by the distorted market." Maj. op. at 12711. However, the majority does not explain what the harm is or what the market distortion is.

> assumed vertical agreement. . . . [T]he plaintiff would rely on the assumed causation, but query whether protecting the plaintiff's interest in higher prices serves the purposes of the antitrust laws. . . . So long as the price of the defendant's product is itself lawful, the only reason for awarding the competitor treble damages is to encourage him to sue, but we have already seen that rationale to be insufficient. And the protection of the defendant's rivals is not the reason for prohibiting maximum resale maintenance. Those more directly affected are fully capable of suing, if they feel themselves detrimentally affected. And if they do not, perhaps the social interest in forbidding the practice is weak to begin with.

(Footnote omitted). 2 P. Areeda, *Antitrust Law* ¶ 346c (1978).

Under the majority's analysis price fixing "distorts the markets, and harms all the participants." Maj. op. at 12709-10. Thus, the majority implies that retail dealers, retail competitors and consumers all suffer antitrust injury as a result of any illegal price fixing agreement. The majority's conclusion ignores the fact that consumers are not injured by maximum vertical price fixing, and retail competitors are not injured and cannot complain about minimum vertical price fixing. *Matsushita,* 475 U.S. at 582-83, 584 n.8. Market participants may all be harmed by different types of price fixing agreements, but they can only bring an action based on the type of agreement that injures them. The majority's refusal to analyze this case in the context of a maximum vertical price fixing agreement,[14] by relying instead on a generic illegal price fixing analysis, has resulted in a dissertation which is premised on "market distortions" that are never fully defined or explained.

I would affirm the district court's order granting summary judgment because USA failed to demonstrate antitrust injury.

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[14]The majority does state that, "[e]ven if [they] were to analyze the question at the more specific level of maximum resale price fixing, given the long term consequences of that practice [they] would reach the same result for similar reasons." Maj. op. at 12711. However, the long term consequences the majority notes are higher prices and reduced services to consumers. Maj. op. at 12715. USA as a competitor would not suffer antitrust injury from either of these speculative long term consequences.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
ENTERED FEBRUARY 25, 1987

USA PETROLEUM COMPANY,
Plaintiff,
v.
ATLANTIC RICHFIELD COMPANY,
Defendant.

No. 83-3508-WPG (Bx)

PRETRIAL ORDER (1) SPECIFYING UNCONTROVERTED FACTS AND (2) DETERMINING THE LEGAL SUFFICIENCY OF PLAINTIFF'S SHERMAN ACT § 1 CASE.

Defendant Atlantic Richfield Company's Motion For A Pretrial Order (1) Defining The Relevant Product Market And (2) Determining The Legal Sufficiency Of Plaintiff's Sherman Act § 1 Case And Proposed Proof Of Vertical Conspiracy ("Defendant's Motion"), having come on for hearing before the Court in a pretrial conference pursuant to Fed. R. Civ. P. 16, and the Court having considered the memoranda and other papers filed by the parties and the factual record previously submitted by Atlantic Richfield Company ("Atlantic Richfield") in support of its motion for partial summary judgment, and having heard oral argument,

IT IS HEREBY ORDERED that Defendant's Motion be granted as set forth below:

Uncontroverted Facts Concerning The Relevant Market And Likelihood of Monopolization

1. The facts set forth below in paragraphs 2 to 4 have been established without substantial controversy and shall therefore be deemed established for all purposes in this action pursuant to Fed. R. Civ. P. 56(d).

2. The "discount segment of gasoline marketing," as alleged to exist in paragraphs 14, 15 and 19 of the First Amended Complaint, does not exist as a separate and distinct product market for antitrust purposes. As set forth more fully in paragraphs 2(a)-(e) below, major-brand and minor-brand gasoline retailers compete with each other in the same market.

a. Consumers can use major-brand and minor-brand gasolines reasonably interchangeably because generally applicable government and industry specifications essentially standardize the chemical characteristics affecting gasoline quality and performance.

b. Major and independent refiners and marketers freely buy, sell and exchange gasoline among each other.

c. The prices of major-brand and minor-brand gasoline exhibit patterns of closely parallel movement. These highly correlated prices show that major-brand and minor-brand gasoline sales occur in a single market.

d. The alleged marketing practices of minor-brand sellers cited by plaintiff USA Petroleum Company ("USA") as placing them in a separate market — low prices, cash-only sales and self-service vendors — are also widely used by major-brand sellers.

e. Both Atlantic Richfield and USA recognized that major-brand and minor-brand stations compete in a single market by regularly surveying prices at both types of stations in setting their own prices.

3. The combined share of the relevant market held by Atlantic Richfield and other ARCO-brand gasoline sellers is clearly insufficient to present a dangerous probability of monopolization, particularly in light of the competition of other major oil companies. The ARCO-brand share of the retail gasoline market in California and Washington, the states in which USA contends it has been injured, has not exceeded 17 percent during the relevant period.

4. Even assuming *arguendo* that there exists a separate "discount" gasoline market, other major oil companies may enter this market, as USA contends that Atlantic Richfield did in April 1982, and the possibility of such entry effectively prevents Atlantic Richfield and other sellers of ARCO-brand gasoline from exercising monopoly power in that market regardless of their market share.

Legal Sufficiency Of Plaintiff USA's Sherman Act § 1 Case And Proposed Proof of Vertical Conspiracy

5. Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the "antitrust injury" requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned, as indicated in paragraphs 2 to 4 hereof, no such showing can be made. *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____ (December 9, 1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, et al.*, 475 U.S. ____

(March 26, 1986); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984). Count One therefore shall be, and hereby is, dismissed with prejudice.

Rule 54(b) Certification

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and accordingly directs the entry of a final judgment dismissing the First Count of the Complaint, which pertains to the alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

DATED: February 19, 1987.

WILLIAM P. GRAY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

USA PETROLEUM COMPANY,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

No. 87-5681
D.C. No. CV 83-3508-WPG

ORDER

Filed January 10, 1989

Before: ALARCON, NELSON and REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

RULE 28.1 LIST OF PETITIONER'S NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

Agro Internacional, S. de R.L. de C.V.
Alyeska Pipeline Service Company
Arco Centennial Corp.
ARCO Channelview, Inc.
Arco Chemical Asia Pacific, Ltd.
ARCO Chemical Canada Inc.
ARCO Chemical China, Limited
Arco Chemical Company
ARCO Chemical Delaware Company
ARCO Chemical (Deutschland) GmbH
ARCO Chemical Espana Co.
Arco Chemical Europe, Inc.
Arco Chemical (Europe) Inc.
Arco Chemical Export Sales Company
Arco Chemical Foreign Sales Corporation
ARCO Chemical Indonesia, Inc.
ARCO Chemical Japan, Inc.
ARCO Chemical Korea, Inc.
ARCO Chemical Middle East, Inc.
ARCO Chemical New Zealand, Inc.
ARCO Chemical Overseas Services, Inc.
ARCO Chemical Pan America, Inc.
ARCO Chemical Products Europe, Inc.
ARCO Chemical (Singapore) PTE, Ltd.
ARCO Chemical Technology, Inc.
ARCO Chemical Texas, Inc.
ARCO Chemical (Thailand), Limited
ARCO Chemical Trading, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chimie France Corporation

ARCO Chimie France S.N.C.
ARCO France, Inc.
ARCO Idemitsu Corporation
ARCO/JSP Company
ARCO Lyondell, Inc.
ARCO Lyondell Licensing, Inc.
ARCO Mont Belvieu Corporation
ARCO Solar Nigeria, Ltd.
ARCO Synthesis, Inc.

Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited

Candel International, Limited
Colonial Pipeline Company
Compania Minera Dos Republicas S.A. de C.V.
Compania de Petroleo Ganso Azul. Ltda.
Cook Inlet Pipe Line Company
Curragh Coal Sales Co. Pty. Ltd.

Dixie Pipeline Company

East Texas Salt Water Disposal Co.
85819 Canada Limited
En ARCO Elastomers Company
En Arco Resins S.p.A.

Guasare Coal International N.V.

Iricon Agency Ltd.

Kenai Pipe Line Company
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company

Las Quintas Serenas Water Company
Logan Aluminum, Inc.
Lyondell Petrochemical Company

Nihon Oxirane Company, Ltd.
Nordfisk Mineselskab A/S
Northrop Incorporated

Oxirane Chemical Company
Oxirane Technology (Japan) Company

P.T. Gema Polytama Kimia
Platte Pipe Line Company

SHOWA ARCO Solar Far East PTG. LTD.
SHOWA ARCO Solar K.K.

Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA } ss.:
COUNTY OF LOS ANGELES

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 7, 1989, I served the foregoing PETITION FOR WRIT OF CERTIORARI OF ATLANTIC RICHFIELD COMPANY on respondent in this action by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Maxwell M. Blecher
Blecher & Collins
611 West Sixth Street
Suite 2800
Los Angeles, California 90017

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 1989, at Los Angeles, California.

J. Gordon Hooper

J. GORDON HOOPER

2

No. 88-1668

In the Supreme Court of the United States

October Term, 1988

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Do the plaintiff's lost sales and profits resulting from its competitor's vertical conspiracy to fix below-market prices constitute compensable antitrust injury?

The Ninth Circuit panel, relying on this Court's precedents, ruled that a vertical conspiracy to fix below-market prices is inherently anticompetitive under Section 1 of the Sherman Act and that damages inflicted on a competitor by the conspiracy constitute antitrust injury.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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v.

USA PETROLEUM COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Parties

USA Petroleum Company[1] ("USA"), an independent gasoline marketer ("independent"), sells gasoline at retail to consumers. (CR 48: ¶ 3.) USA gasoline stations compete with ARCO-brand dealers in California and other western states. (CR 48: ¶ 17.)

[1] Pursuant to Rule 28.1, USA certifies that its corporate affiliates and subsidiaries, not wholly owned, are USA Petroleum (Bermuda) Limited, Isla Petroleum Corporation and Gasolinas de Puerto Rico Corporation.

ARCO is a major integrated oil company that produces, refines and markets petroleum products. ARCO markets gasoline at wholesale to independently owned ARCO-brand dealers and at retail through company-owned stations. (CR 48: ¶¶ 4, 11-13.)

ARCO'S Price-Fixing Conspiracy

Beginning in April 1982, ARCO organized a vertical price-fixing scheme with its branded dealers to fix the resale price of gasoline at below-market levels. (CR 48: ¶¶ 24-25.) ARCO's purpose was to eliminate the independents, who traditionally operated low-overhead, high-volume stations that sold gasoline at prices well below the virtually identical prices charged by the major oil companies. (CR 48: ¶¶ 9-10, 14-15, 18-19, 25.)

ARCO's conduct demonstrates that the artifically low resale gasoline prices that it fixed would not have existed absent the conspiracy. ARCO targeted the ARCO-branded dealers who competed directly with independents and told them what retail prices to charge. ARCO monitored the retail prices daily and secured dealer compliance through coercive tactics. ARCO threatened to reduce gasoline supply, terminate operating agreements or eliminate price allowances to dealers who refused to charge the fixed price. (CR 48: ¶¶ 26-27, 37.)

ARCO's conspiracy had its intended effect. ARCO's below-market retail prices were lower than the prices paid by independents to purchase gasoline at wholesale.[2] (CR 48: ¶¶ 31, 39.) Independents, or anyone who did not participate in a vertical conspiracy, could no longer operate profitably. Many independents were forced to liquidate and exit the market. (CR 48: ¶ 18.) USA has managed to survive, but only by closing or selling off gasoline stations and drastically curtailing its retail operations. At its remaining stations, USA has lost considerable sales and profits. (CR 48: ¶¶ 18, 39-40.)

As independents disappeared in California, ARCO catapulted from the number four position in 1981 to the number one position by the end of 1983. (CR 48: ¶ 22.) An already oligopolistic marketplace has become even more concentrated and the price discipline once afforded by the independent market segment has been eliminated.

USA's Antitrust Complaint

On May 27, 1983, USA filed a complaint alleging that ARCO implemented a vertical price-fixing conspiracy in violation of Section 1 of the Sherman Act and attempted to monopolize the market in violation of Section 2 of the Sherman Act.[3] ARCO moved to dismiss the complaint, arguing that (1) USA lacked standing to sue for its Section 1 claim; and (2) ARCO did not have a dangerous probability of successful monopolization for the Section 2 claim. The district court denied ARCO's motion as to Section 1 but dismissed the Section 2 claim with leave to amend. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1301-02, 1304, 1308 (C.D. Cal. 1983). USA filed an amended complaint (CR 48), and ARCO again moved to dismiss the Section 2 claim. The district court denied

[2]The conspiracy was funded by ARCO's manipulation of the intercompany "transfer" price of crude oil between its production and refining departments and its deliberate underpayment of federal windfall profit taxes and state taxes. (CR 48: ¶ 32.)

[3]USA also alleged that ARCO violated the Robinson-Patman Act and various state laws. These claims, on which ARCO did not move for summary judgment, have been stayed pending resolution of ARCO's petition for a writ of certiorari.

that motion. (CR 54.) ARCO answered the amended complaint on May 3, 1984. (CR 55.)

ARCO's Motion for Summary Judgment

Before any depositions had been taken and before the completion of document discovery, ARCO moved for summary judgment on USA's Section 1 price-fixing claim.[4] ARCO conceded, for purposes of its motion, that it committed a per se violation of Section 1 by organizing a vertical conspiracy with ARCO-brand dealers to fix below-market prices. ARCO's *sole* basis for summary judgment was that it had no dangerous probability of successfully monopolizing any relevant market. This unprecedented argument rested on two propositions: (1) a conspiracy to fix below market prices, even if antithetical to free market competition and a per se violation of Section 1, should create liability only if prices are fixed at "predatory" levels within the meaning of Section 2; and (2) these "predatory" levels cannot, as a matter of law, be fixed by conspirators who do not have a dangerous probability of successful monopolization. Asserting that USA could not establish the requisite dangerous probability, ARCO concluded that USA had not suffered antitrust injury.

USA opposed ARCO's motion as wholly contrary to the statutory scheme of the Sherman Act and this Court's precedents. Section 1 condemns vertical conspiracies to fix below-market prices, without more, as inherently anticompetitive. Both the express language of Section 1 and this Court's precedents require only an unreasonable restraint of trade and reject the threatened monopoly power requirement proposed by ARCO.

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[4]ARCO also moved for summary judgment on USA's attempted monopolization claim under Section 2. USA voluntarily dismissed with prejudice that claim. (CR 82.)

Damages flowing from the anticompetitive effect of such price-fixing is injury of the type the antitrust laws were intended to prevent. USA also filed an affidavit pursuant to Fed. R. Civ. P. 56(f), informing the district court that, in any event, depositions and expert discovery were necessary before the actual marketplace effects of ARCO's price-fixing conspiracy could be determined. (CR 89: Exhibit A.)

Contrary to the impression left by ARCO's petition for a writ of certiorari, the motion for summary judgment did not raise the issue of whether the *level* of ARCO's fixed prices was "predatory." (Petition at 28.) Not surprisingly, the district court made no findings on that issue and instead granted ARCO's motion based exclusively on the absence of threatened monopolization. (App. B, ¶¶ 3-5.)[5]

The Ninth Circuit's Decision

The Ninth Circuit reversed the district court's grant of summary judgment. *USA Petroleum Co. v. Atlantic Richfield, Co.*, 859 F.2d 687 (9th Cir. 1988). The majority of the panel held that to establish antitrust injury USA is required to prove that its damages result from ARCO's agreement with its branded dealers to fix prices below the level that otherwise would have prevailed absent the conspiracy. The court rejected ARCO's contention that the elements of predatory pricing under Section 2, *i.e.*, dangerous probability of successful monopolization, can be engrafted onto a Section 1 price-fixing case under the rubric of antitrust injury.

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[5]USA has never conceded that the levels of ARCO's fixed prices are not "predatory." To the extent that the dissenting opinion filed in the Ninth Circuit is to the contrary, it unfortunately misstates the record. *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 703 (9th Cir. 1988) (Alarcon, J., dissenting).

ARCO filed a petition for rehearing and suggestion for rehearing en banc. Not a single judge requested a vote on the suggestion for rehearing en banc. On January 10, 1989, the Ninth Circuit entered an order denying ARCO's petition. On April 7, 1989, ARCO filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

ARCO's petition for a writ of certiorari should be denied because the Ninth Circuit's decision is faithful to the precedents established by this Court. The intercircuit conflict asserted in ARCO's petition is, in reality, a conflict between an overreaching Seventh Circuit, openly hostile to antitrust law, and this Court. The Seventh Circuit's view is that the Supreme Court's decisions condemning maximum price-fixing as injurious to the competitive process are wrong.[6] It has twice ruled that such price-fixing is "lawful price competition" and, therefore, cannot cause antitrust injury to any private plaintiff. In contrast, the Ninth Circuit adhered to this Court's recent rulings,[7] in concluding that USA's damages from its competitor's unlawful price-fixing do constitute antitrust injury.

Moreover, the question framed in ARCO's petition is not ripe for review. ARCO asks this Court to rule that a plaintiff seeking to establish antitrust injury from vertical maximum price-fixing under Section 1 of the Sherman Act must prove predatory pricing. Even

[6] *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

[7] This Court reaffirmed the prohibition against maximum price-fixing only last term. *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1525 (1988). ARCO presents no reason why this Court should reopen this issue only one year later.

assuming that this Court is prepared to overrule long-standing precedent[8] and impose such a requirement, this is not the case in which to define, for the first time, what constitutes predatory pricing. In this case, there is no factual record as to the level of ARCO's fixed prices, their relationship to cost, the disciplining effect of the fixed prices, the relationship of ARCO's fixed prices to the prices of other sellers, ARCO's anticompetitive intent, its ability to obtain a return on investment or the marketplace effect of the price-fixing.

Accordingly, this Court should deny certiorari.

I.

AS A PROPER APPLICATION OF THIS COURT'S PRECEDENTS, THE NINTH CIRCUIT'S DECISION SHOULD NOT BE SUBJECT TO FURTHER REVIEW

A. The Supreme Court Has Unequivocally Condemned Vertical Maximum Price-Fixing as Anticompetitive Per Se

This Court has consistently condemned price-fixing, regardless of the level of fixed prices, as antithetical to a free market economy. Price is the free market's "central nervous system." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)). The inherent anticompetitive effect of all price-fixing agreements that raise, lower,

[8] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982); *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

or stabilize prices is that they directly interfere with the free market forces of supply and demand that should set price. *Socony*, 310 U.S. at 221. Because of this injury to the competitive process, this Court has deemed conspiracies to fix below-market prices, such as ARCO's, as anticompetitive.[9] *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982); *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

Ultimately, maximum price-fixing discourages both innovation and non-price competition, such as service, that consumers may demand. *Arizona*, 457 U.S. at 348; *Albrecht*, 390 U.S. at 152-53. In addition, maximum resale price maintenance erects artificial barriers to entry. Artificially depressed prices discourage potential entry by competitors, who would otherwise be attracted to higher prices in an unrestrained market. *Arizona*, 457 U.S. at 348; L. Sullivan, *Handbook of the Law of Antitrust* 211-12 (1977).

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[9]This anticompetitive effect justifies the per se rule against vertical maximum price-fixing. *See* Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125, 1148 (1987). To the extent ARCO requests that this Court revisit the issue of whether vertical maximum price-fixing should be per se lawful, USA objects. (*See* Petition at 15 n.5.) Throughout the proceedings below, ARCO expressly conceded the per se illegality of its conspiracy. *USA*, 859 F.2d at 694. This Court generally does not review questions that were neither raised nor litigated below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984). This Court reaffirmed the per se rule only last term in *Sharp*, 108 S. Ct. at 1525. This case does not present any basis for reconsideration of established precedent.

B. The Ninth Circuit Correctly Applied Established Supreme Court Precedent

The Ninth Circuit followed 50 years of Supreme Court precedent in holding that a horizontal competitor can establish antitrust injury from ARCO's admitted vertical conspiracy to fix below-market prices.

The Ninth Circuit held that USA suffered injury "of the type the antitrust laws were intended to prevent." 859 F.2d. at 694-97; *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The court first identified the disruption of market price mechanisms as the fundamental anticompetitive consequence of vertical maximum price-fixing. 859 F.2d at 693. Then, the court looked at the nature of USA's claimed injury. Noting that losses incurred by a horizontal competitor because of its inability to counter artificially depressed prices are precisely the type of loss that the displacement of market forces would be likely to cause, the court held that USA had suffered cognizable antitrust injury. *Id.* at 696-97; *see Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986) (plaintiff establishes antitrust injury when defendant fixes price below the level necessary to sell its product).

The Ninth Circuit was careful to apply antitrust injury in a way that serves the Sherman Act's policy of preserving the competitive process. 859 F.2d at 693, 697. It accorded a private right of recovery to the disadvantaged rival and coerced dealer, the persons most immediately impacted by the conspiracy's interference with the market's price mechanisms. Ironically, these are the very private parties expressly excluded by the injury analysis advocated by the Seventh Circuit and ARCO.

C. The Seventh Circuit's Radical Departure from This Court's Precedent Does Not Constitute a Basis for Certiorari in This Case

ARCO's petition relies heavily on the Seventh Circuit's fundamentally different approach to the antitrust injury analysis in maximum price-fixing cases. The Seventh Circuit virtually concedes, however, that its rulings conflict with the decisions of this Court. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1420 (7th Cir. 1989); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984). It adopted an antitrust injury standard that is designed to ensure that private litigants cannot enforce the substantive vertical maximum price-fixing offense with which it disagrees.

As part of its injury analysis, the Seventh Circuit has imposed a Section 2 element on maximum price-fixing under Section 1.[10] A plaintiff must prove that the conspirators fixed a "predatory" price as defined in that circuit.[11] *Indiana Grocery*, 864 F.2d at 1420; *Jack Walters*, 737 F.2d at 709.

This requirement stems from the Seventh Circuit's belief that maximum price-fixing is "lawful price competition." *Jack Walters*, 737 F.2d at 709; *see Indiana Grocery*, 864 F.2d at 1418 (maximum price-fixing is itself "competitive"). The Seventh Circuit explicitly acknowledges that its characterization of maximum price-fixing as purely competitive behavior conflicts with this Court's decisions. In *Indiana Grocery*, the court virtually admits that it is overruling *Albrecht*:[12]

> Read in a vacuum, *Albrecht* might seem to prevent us from affirming the district court in this case. *Albrecht*, however, was decided nine years before the Court formulated the antitrust injury requirement in *Brunswick* and says nothing about antitrust injury or antitrust standing. It therefore does not preclude us from applying the antitrust injury concept to Indiana Grocery's price-fixing claim in this case.

Id. at 1420; *see Jack Walters*, 737 F.2d at 706 (anticipating the demise of *Albrecht*).

[10]The Seventh Circuit's superimposition of Section 2 predation requirements on Section 1 claims based on concerted activity contravenes the Sherman Act's basic distinction between concerted activity and single firm conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). A conspiracy to fix price is subject to more stringent scrutiny than unilateral pricing because of its greater anticompetitive risk. *Id.*; *Fisher v. Berkeley*, 475 U.S. 260, 266 (1986).

Equally inappropriate is ARCO's argument that a plaintiff should be required to prove a dangerous probability of a successful monopolization to establish antitrust injury in a Section 1 case. Section 1 condemns concerted conduct that is an unreasonable restraint of trade. 15 U.S.C. § 1. As this Court has expressly held, under Section 1, "it is not necessary to prove that concerted activity threatens monopolization." *Copperweld*, 467 U.S. at 767-68. Specifically, this Court has recognized that price-fixing can achieve anticompetitive effects even absent a dangerous probability of successful monopolization. *Socony*, 310 U.S. at 221, 224 & n.59.

[11]Predation is defined solely by the level of price. *Indiana Grocery*, 864 F.2d at 1419 (claim rests "on the defendants' fixing of prices *at a certain level*"); *Jack Walters*, 737 F.2d at 709 (fixed prices were not below cost and, therefore, were "lawful prices"). Even the Seventh Circuit does not accept ARCO's proposition that only price-fixers with a dangerous probability of successful monopolizaiton can fix "predatory" prices. *See Indiana Grocery*, 864 F.2d at 1413 n.4.

[12]The court in *Indiana Grocery* rejected a damages claim virtually identical to that reinstated by this Court in *Albrecht*. In *Albrecht*, a dealer sued its supplier for lost sales and depressed profits from having to compete with a maximum price-fixing conspiracy. On remand from this Court, the plaintiff recovered treble damages based on lost profits and loss of going concern value. *Albrecht v. Herald Co.*, 452 F.2d 124, 125-26 (8th Cir. 1971).

The Seventh Circuit's effort to overrule the substantive offense through the guise of antitrust injury is disingenuous. This Court reaffirmed the per se rule against vertical maximum price-fixing only last term. *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1525 (1988). If maximum price-fixing is anticompetitive for purposes of the substantive antitrust laws, it cannot at the same time be "lawful price competition" under antitrust injury analysis. Such semantic gymnastics "divorces antitrust recovery from the purposes of the antitrust laws" in contravention of this Court's decision in *Brunswick*. 429 U.S. at 487. Even a commentator sympathetic to the Seventh Circuit criticized its disregard of controlling precedent:

> I cannot escape the conclusion the Judge Posner—growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht*—has decided to undertake that task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. . . . But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L.J. 1014, 1026 (footnote omitted).

Retreating from the Seventh Circuit's wholesale renunciation of *Albrecht*, ARCO proposes an intermediate position.[13] ARCO asserts that the only anticom-

[13]Contrary to ARCO's contention, the Seventh Circuit's ruling applies equally to coerced dealers and disadvantaged competitors. The Seventh Circuit set forth the injury analysis in a case in which a dealer sued its supplier and recently extended it to competitors. *Jack Walters*, 737 F.2d at 707; *Indiana Grocery*, 864 F.2d at 1418.

petitive effect of its vertical conspiracy is the elimination of intrabrand competition and, therefore, only its coerced dealers suffer antitrust injury. (Petition at 17-18.) Disadvantaged horizontal rivals are outside the conspiracy's anticompetitive reach; they do not suffer antitrust injury. (Petition at 8, 18-20.)

Only last year, however, this Court acknowledged the anticompetitive effects of vertical price-fixing on interbrand competition. *Sharp*, 108 S. Ct. at 1520; *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977). In *Sharp*, this Court observed that vertical price-fixing stimulates interbrand competitors to organize similar conspiracies, which in turn facilitates horizontal cartelization. *Sharp*, 108 S. Ct. at 1520; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987) (industry-wide vertical price-fixing is "virtually certain to reduce interbrand competition". Based on this rationale, this Court expressly reaffirmed that vertical maximum price-fixing is per se unlawful. *Sharp*, 108 S. Ct. at 1525.

ARCO does not articulate how its price-fixing benefits competition in this case. ARCO argues that USA would have suffered the identical loss if ARCO-brand dealers had lowered their prices unilaterally. This argument assumes that ARCO-brand dealers would have unilaterally lowered prices to the identical level fixed by the conspiracy. This assumption is not only wholly unsupported in the record but also implausible. ARCO would hardly have resorted to violating the law if it truly believed that ARCO-brand dealers could achieve the same result lawfully. The more plausible inference is that ARCO organized the vertical conspiracy to exert its economic muscle in the retail gasoline market to drive the independents out of the market.

Applying the *Sharp* analysis, should USA and other independents organize vertical conspiracies with suppliers so as to be able to fix prices "competitive" with ARCO's fixed prices? Should the other major oil companies also implement vertical conspiracies with their dealers to fix prices so as to be able to compete with ARCO's fixed gasoline prices? If vertical price-fixing is unlawful, conduct that stimulates its proliferation in the marketplace cannot possibly be considered procompetitive.

The Ninth Circuit properly rejected the Seventh Circuit's attempt to rewrite the substantive antitrust laws and, instead, followed this Court's well-established precedent. The Seventh Circuit's refusal to abide by this Court's rulings does not constitute a basis for further review of this case. Accordingly, this Court should deny certiorari.

II.

ARCO'S "PREDATORY PRICING" QUESTION IS NOT RIPE FOR REVIEW BY THIS COURT

Even assuming, for the moment, that this Court is prepared to overrule decades of precedent and allow price-fixers to escape liability if they do not fix "predatory" prices, this case lacks the factual record necessary to enable this Court to define predatory pricing under Section 1 of the Sherman Act. The absence of an evidentiary record stems from the fact that ARCO did not move for summary judgment below on the ground that it fixed prices that were not "predatory."

This Court has defined "predatory" pricing under Section 1 as "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Matsushita*, 475 U.S. at 584-85 n.8. This Court, in recent cases, has expressly declined invitations to articulate a more precise definition of predatory pricing under either Section 1 or Section 2. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-18 n.12 (1986); *Matsushita*, 475 U.S. at 585 nn. 8-9.

USA's allegations are consistent with this Court's predatory pricing definition under Section 1. USA complains that ARCO fixed prices that are (1) below the market level that would prevail in an unrestrained market absent the conspiracy; or (2) below some appropriate measure of cost. (CR 48: ¶¶ 27-31.) It is entirely possible that, after discovery, USA will prove "predatory" price-fixing and, therefore, render the question ARCO now raises moot.

As ARCO presents a controversy that is not yet ready for review, this Court should deny certiorari and permit USA to undertake discovery and ascertain its proof.

III.

CONCLUSION

As the Ninth Circuit's decision is consistent with Supreme Court precedent and, in any event, the question raised by ARCO is not ripe for this Court's review, the opinion below should not be subjected to further review. ARCO's petition for a writ of certiorari, therefore, should be denied.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 9 , 1989, I served the within *Respondent's Brief in Opposition to Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 9, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)

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No. 88-1668

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
USA PETROLEUM COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Statutes and Rules

Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this reply brief in support of its Petition For Writ Of Certiorari (the "Petition").

Respondent's Brief In Opposition ("Opp.") readily acknowledges the direct conflict between the Ninth Circuit decision in this case and the decisions of the Seventh Circuit on the antitrust injury issue presented here. (Opp. 6, 10-14 (conceding the "fundamentally different approach to the antitrust injury analysis" in maximum vertical price-fixing cases)).

The Brief in Opposition offers two purported reasons why this Court nonetheless should refuse to resolve this conflict. It first asserts that this Court should not grant review because the Ninth Circuit decision, unlike the Seventh Circuit decisions, does not conflict with this Court's precedent on this antitrust injury issue. That assertion, even if true, ignores the fact that this conceded, direct inter-circuit conflict presents a compelling case for the Court to resolve an issue as important as that presented here. Moreover, the assertion is based entirely upon Respondent's efforts to confuse the antitrust injury requirements at issue here with the elements of a substantive antitrust violation, which are not at issue here. The Brief in Opposition next asserts that the antitrust injury issue presented here is not ripe, because it depends upon an assumption, not supported by either the record or the findings below, that Respondent's prices are not "predatory." This assertion is totally disingenuous, for the district court did make such a finding, based upon a substantial record. The nonpredatory nature of Respondent's prices is both law of the case and the obvious predicate of the Ninth Circuit decision which ARCO asks this Court to review.

I.

RESPONDENT'S ARGUMENT THAT THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENTS IS INCORRECT AND BASED ENTIRELY ON RESPONDENT'S CONFUSION BETWEEN ANTITRUST INJURY AND PER SE ILLEGALITY

This Court first articulated the antitrust injury requirement in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Court there held that it was not sufficient for a private antitrust plaintiff to establish only the defendant's violation and its injury causally related thereto. The Court held that the plaintiff also must show that the nature of its injury reflects the anticompetitive effects that make the conduct unlawful. ARCO's Petition demonstrated that Respondent could not satisfy that requirement because, even assuming it could prove injury causally related to vertical maximum price fixing, its alleged injury — lost profits and sales from having had to compete against the lower prices — did not reflect the anticompetitive effects that make vertical maximum price fixing per se unlawful. (Petition, 10-21.)

The Brief in Opposition completely ignores that demonstration and, indeed, largely ignores the antitrust injury requirement. The first section of the argument simply proves the irrelevant proposition that vertical maximum price fixing is per se illegal under this Court's existing decisions.[1] (Opp. 7-8.) The second section begins with the

[1]USA mischaracterizes this Court's decision, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. _____, 108 S.Ct. 1515, 99 L. Ed. 2d 808 (1988), in stating that the Court there "reaffirmed" per se treatment of vertical maximum price fixing. (Opp. 6 n.7 and 12.) In *Sharp*, the Court cited *Albrecht v. Herald Co.*, 390 U.S. 145 (1968),

assertion that "[t]he Ninth Circuit followed 50 years of Supreme Court precedent in holding that a horizontal competitor can establish antitrust injury from ARCO's admitted vertical conspiracy to fix below-market prices." (Opp. 9.) That assertion is obviously incorrect and reveals the fundamental confusion running throughout the Brief in Opposition, because the antitrust injury requirement is only twelve years old. Moreover, the assertion is incorrect even assuming the reference is to this Court's precedents on the per se illegality of vertical maximum price fixing. Those precedents do not support the Ninth Circuit decision because, as demonstrated in the Petition at 14-20, they are based on the anticompetitive effects on the defendants' coerced dealers, and not on any effects on the horizontal competitors of those dealers. This Court has never identified anticompetitive effects on competitors as a reason for holding vertical maximum price fixing per se unlawful.[2]

not to address *Albrecht*'s analysis of the per se status of vertical maximum price fixing but to distinguish the case before it from *Albrecht* on the ground that the latter involved an agreement to "adhere to the specified price." 99 L. Ed. 2d at 823-24. In any case, ARCO's Petition does not require the Court to address the issue of the per se illegality of vertical maximum price fixing. (Petition, 15 n.5.)

[2]Respondent cites *Sharp, supra*, 99 L. Ed. 2d at 817, and *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42 (1987), as condemning vertical price fixing on the ground that it may facilitate horizontal cartelization. (Opp. 13-14.) Both *Sharp* and *Duffy*, however, involved the setting of *minimum* prices. It is difficult to envision an industry cartel acting in concert to lower the prices its members charged or to set maximum prices. Moreover, no such cartelization is alleged here.

Respondent also contends that vertical maximum price fixing might produce an anticompetitive effect by discouraging individual dealers from non-price competition through offering superior service or by erecting barriers to entry by new competitors. (Opp. 8.) The

In any event, this Court's precedents on Sherman Act § 1 do not control the different antitrust injury issue presented by Clayton Act § 4. *Brunswick*, 429 U.S. at 488-89; *see Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989) ("While sections 1 and 2 of the Sherman Act focus on competitive conditions in the market as a whole . . . section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be an 'antitrust injury' "). Respondent also incorrectly characterizes *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986), as holding that a plaintiff's losses from competing against prices fixed by its rivals that are "below the level necessary to sell" their products always amount to antitrust injury. (Opp. 9; *see id.* 14-15.) The cited language, however, addressed only the threshold cause-in-fact requirement for an antitrust cause of action and not the antitrust injury requirement of *Brunswick*.[3]

The Brief in Opposition's third argument attacks the Seventh Circuit for improperly "impos[ing] a Section 2 element" — *i.e.*, predatory pricing — in a Sherman Act § 1 case. (Opp. 10-14.) This argument again confuses

Court, however, has not identified any such effects as a reason for making vertical maximum price fixing unlawful.

[3]In *Matsushita*, the Court was faced with alleged conspiracies intended to "set maximum prices above market levels, or . . . set minimum prices at *any* level." 475 U.S. at 583-85 n.8. In the footnote cited by Respondent, the Court held that conspiracies of this kind do not subject a competitor to any actual injury sufficient to satisfy the cause-in-fact element of an antitrust cause of action. *Id.* In stating that an antitrust plaintiff has "not suffered an antitrust injury unless" the prices against which it competes were set at below market levels, the Court merely indicated that such below-market pricing is *necessary* to state an antitrust cause of action, not that it is sufficient to do so. *Id.*

antitrust injury with the substantive elements of a Sherman Act offense. The Seventh Circuit did not hold that vertical maximum price fixing was unlawful only where the fixed prices were predatory. Rather, it held that a *competitor* suffers antitrust injury and therefore can bring a claim under Clayton Act § 4 only where its injury results from predatory prices.[4] *See Indiana Grocery*, 864 F.2d at 1416-1420. Only where the fixed maximum prices are predatory as this Court has defined the term — *i.e.*, prices that can pose a real threat of " 'monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain,' " — will the injury to the competitor plaintiff coincide with an injury to consumers. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118, 121 n.17 (1986), *quoting Matsushita*, 475 U.S. at 589.

II.

THE RULING BELOW IS RIPE FOR THIS COURT'S REVIEW

The Brief in Opposition alternatively argues that the Court should not review the Ninth Circuit decision on the ground that it presents a purported "predatory pricing"

[4]Respondent incorrectly asserts that the Seventh Circuit rule would deny a "coerced dealer" recovery of losses suffered from its supplier's vertical maximum price fixing. (Opp. 9.) The Seventh Circuit's *Jack Walters* decision makes clear that the plaintiff's losses found not to be antitrust injury were those flowing from its competition with other dealers who complied with the supplier's vertical maximum price fixing, not those from the plaintiff's own compliance with such price fixing. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709, *cert. denied*, 469 U.S. 1018 (1984) ("the only harm to Walters [the plaintiff] came from the fact that competing dealers (or Morton [the defendant] itself) would lower their prices to consumers if Walters did not"). *See Indiana Grocery*, 864 F.2d at 1418 (construing *Jack Walters* to this effect).

question that is "not ripe for review by this Court." (Opp. 14-15.) The predatory pricing question is assertedly not "ripe" because there is neither a factual record nor a finding in the district court establishing that the prices at competing ARCO-brand stations were nonpredatory. These contentions, however, misstate the proceedings below. Even more fundamentally, the purported issue of whether the challenged prices are predatory was not raised on appeal.

The majority and dissenting opinions in the Ninth Circuit most clearly belie Respondent's attempt to manufacture an issue that was not presented on appeal and therefore is not presented here. The majority opinion stated that the "question on appeal is whether *in the absence of proof of predatory pricing* a competitor can recover damages because of a maximum resale price maintenance agreement." 859 F.2d at 689 (Petition, 3a) (emphasis added). The dissenting opinion stated the issue as "whether a retail competitor suffers antitrust injury in the form of lost profits as a result of a *non-predatory* maximum vertical price fixing agreement." 859 F.2d at 698 (Petition, 25a) (emphasis added). These Ninth Circuit opinions could assume, as this Court also can assume, that the challenged prices were not predatory because the district court had so found and Respondent had not challenged that finding on appeal.

The Brief in Opposition asserts that "ARCO did not move for summary judgment below on the ground that it fixed prices that were not 'predatory.'" (Opp. 14.) That assertion is wrong. ARCO rested its summary judgment motion squarely upon the proposition that USA's injury from the prices of ARCO-brand sellers could "constitute[] 'antitrust injury' for Clayton Act purposes only if those prices are 'predatory'" in that they "create[] the

dangerous probability that the defendant(s) may achieve a monopoly with the concomitant ability to raise prices in the future." Memorandum In Support Of Motion For A Pretrial Order, etc., at 10, 16-18 (CR 83). To establish that the prices in question could not be predatory, ARCO submitted a substantial and undisputed factual record showing the absence of any conceivable danger that ARCO-brand sellers could obtain monopoly power in the gasoline market that might enable them later to raise prices to supracompetitive levels and thereby to recoup their losses during the period of alleged predation. *Id.* at 16-18 (CR 83); *see* Declarations And Appendices, etc. (CR 80). Respondent elected not to challenge that showing. It instead contended that the issue whether the prices were predatory was irrelevant, because vertical maximum price fixing is per se illegal.[5]

The district court, in granting summary judgment, made an explicit finding that the ARCO-brand prices at issue were not predatory. First, the court established pursuant to Fed. R. Civ. Proc. 56(d) the undisputed facts submitted by ARCO showing the absence of threatened monopolization. February 17, 1987 Order (Petition, App. B), ¶¶ 1-4 (CR 100). Then, ruling that USA could not establish antitrust injury "without showing such [vertically-imposed maximum] prices to be predatory," it further found: "[u]nder the circumstances here concerned . . . no such showing can be made." *Id.*, ¶ 5.

USA did not challenge this finding on appeal. The dissenting opinion expressly acknowledged this fact, stating: "[t]he district court found ARCO's prices were not predatory, and USA does not challenge this finding on

[5] *See, e.g.,* Plaintiff's Statement of Genuine Issues, etc., ¶¶ 1-3 (CR 88).

appeal."[6] 859 F.2d at 703 (footnote omitted). The majority opinion similarly recognized this fact in its statement of the question on appeal. (*See* pp. 6-7 above.)

Under a long line of Ninth Circuit authority, Respondent's failure to challenge on appeal the district court's finding serves to establish that finding as law of the case and to foreclose any future proceedings on this issue. *Munoz v. County of Imperial,* 667 F.2d 811, 817 (9th Cir.), *cert. denied,* 459 U.S. 825 (1982); *Penn International Industries v. Pennington Corp.,* 583 F.2d 1078, 1082 (9th Cir. 1978); *Calhoun v. Bernard,* 359 F.2d 400, 401 (9th Cir. 1966). This is true notwithstanding the Ninth Circuit's reversal on other grounds of the judgment of dismissal entered on the basis of the district court's summary judgment order. *E.g., Munoz,* 667 F.2d at 817. Respondent's contention (Opp. 15) that it could prove predatory pricing on remand is simply wrong.

Respondent is also wrong in contending that the Petition would require the Court to determine the circumstances in which pricing by a dominant firm or a conspiracy encompassing a large share of the market should be condemned as "predatory" for purposes of imposing substantive antitrust liability, an issue that the Court has reserved in prior cases.[7] The antitrust injury

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[6]Respondent unfairly accuses Judge Alarcon of "misstat[ing] the record" in making this statement in his dissent. (Opp. 5 n.5.) However, Respondent cites to no part of the record that would refute the statement.

[7]Opp. 7. Respondent there complains that there is no factual record as to "the level of ARCO's fixed prices, their relationship to cost, the disciplining effect of the fixed prices," etc. None of those factors, however, is relevant where, as the district court found here, the party charging the prices cannot obtain the monopoly power necessary to charge supracompetitive prices in the future.

issue decided here involved only the threshold question of whether fixed prices can be predatory for antitrust injury purposes when there is no reasonable probability that they will create an anticompetitive market structure that could result in future noncompetitive pricing injurious to consumers. Only prices that are "predatory" in this sense can be " 'inimical to the purposes of [the antitrust] laws,' [citing *Brunswick*], and . . . capable of inflicting antitrust injury." *Cargill,* 479 U.S. 118 (footnote omitted). The district court's finding and the factual record below more than amply establish the absence of such predatory prices here. Petition, 5 (describing this record). *See, e.g., Cargill,* 479 U.S. at 119 n.15 ("Excel's 21% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing").[8]

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[8]Respondent's claim that "[p]redation is defined solely by the level of price" (Opp. 11 n.11) is clearly incorrect. This Court, in the language quoted above from *Cargill* and elsewhere, as well as the Ninth Circuit, has held that predatory pricing occurs only "when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time." *Transamerica Computer Co. v. IBM,* 698 F.2d 1377, 1384 (9th Cir.), *cert. denied,* 464 U.S. 955 (1983).

CONCLUSION

For the reasons stated above and in ARCO's Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

May 15, 1989.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL:

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } SS.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, CA 90015.

On May 17, 1989, I served the within Reply Brief in support of Petition for Writ of Certiorari, Atlantic Richfield Company vs. USA Petroleum Company, United States Supreme Court October Term 1988, No. 88-1668, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Maxwell M. Blecher
Blecher & Collins
611 West Sixth Street
Suite 2800
Los Angeles, California 90017

All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on May 17, 1989, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA

(4)

No. 88-1668

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

JOINT APPENDIX

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**Petition For Certiorari Filed April 7, 1989
Certiorari Granted June 5, 1989**

TABLE OF CONTENTS

The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

RELEVANT DOCKET ENTRIES

PLAINTIFF	DEFENDANT
USA PETROLEUM COMPANY	ATLANTIC RICHFIELD COMPANY

DOCKET NO. 83-3508 WPG (Bx)

DATE	NR	PROCEEDINGS
5/27/83	1)	Filed complaint and demand for jury trial. Issued summons. Case referred to Magistrate Brown for discovery.
6/15/83	2)	Filed order (WPG)(PAR) transferring action to the calendar of Judge Gray for all further proceedings.
7/1/83	5)	Filed plaintiff's notice of motion and motion to rescind order of transfer returnable 7/25/83, 10 a.m.
7/25/83	8)	Filed stipulation and order (WPG) that this action has not been and will not be in any way consolidated with *In Re Petroleum Products Antitrust Litigation* MDL Docket No. 150 (WPG), that plaintiff's motion to rescind may and is hereby withdrawn (Entered 8/11/83). Mailed copies.
8/22/83	10)	Notice of motion to dismiss; memorandum in support. Defendant.
8/23/83	11)	Notice of taking deposition of records only of Standard Oil Co. of Ohio on 9/14/83. Plaintiff.

8/23/83	12)	Notice of taking deposition of records only of Union Oil Co. on 9/16/83. Issued Plaintiff.
8/23/83	13)	Notice of taking deposition of records only of Texaco, Inc. on 9/20/83. Plaintiff.
8/23/83	14)	Notice of taking deposition of records only of Standard Oil Co. of California. Plaintiff.
8/23/83	15)	Notice of taking deposition upon oral examination of Mobil Oil Corp. on 9/21/83 and Exxon Corp. on 9/22/83. Plaintiff.
8/23/83	16)	Notice of taking deposition of records only of Shell Oil Co. on 9/27/83. Plaintiff.
9/8/83	18)	Designation of deponent in response to Plaintiff's deposition subpoena to testify or produce documents or things. Third party Union Oil of California.
9/26/83	20)	Memorandum in opposition to Defendant's motion to dismiss (Plaintiff); returnable on 10/27/83 10 a.m.
9/27/83	21)	Notice and motion for protective order. Defendant 10/24/83 10 a.m.
9/27/83	22)	Memorandum of Points and Authorities. Defendant.
10/7/83	25)	Memorandum in opposition to motion for protective order. Plaintiff.
10/14/83	27)	Memorandum in reply to Plaintiff's memorandum in opposition to Mobil Oil's motion for protective order.

10/17/83	28)	Memorandum of Points and Authorities. Non-party Exxon Corp.
10/26/83	32)	Reply memorandum in support of Defendant's motion to dismiss.
10/24/83	33)	Minute order: Non-party motion for protective order heard and granted in part and denied in part. Mobil to make available to Plaintiff ARCO's conduct withholding.
10/28/83	34)	Memorandum in opposition to Defendant's motion to dismiss. Plaintiff supplement.
10/31/83	36)	Minute order: Defendant's motion to dismiss argued and denied.
11/17/83	37)	Opposition to motion for protective order. Plaintiff.
11/21/83	38)	Reply memorandum of points and authorities in support of motion for protective order. Exxon.
11/23/83	39)	Supplemental brief in support of opposition to Exxon's motion for protective order. Plaintiff (filed under seal).
11/28/83	41)	Minute order: Non-party Exxon's motion for protective order heard and court orders each document used for discovery to be reviewed by third party.
12/6/83	42)	Stipulation and protective order.
12/15/83	43)	Filed memorandum of decision. (Entered 12/16/83) Mailed copies and notice.
1/11/84	45)	Stipulation and protective order.
1/30/84	48)	First amended complaint and jury demand.

3/12/84	50)	Notice of motion and motion (4/9/84, 10 a.m.) to dismiss count two of amended complaint. Defendant.
3/26/84	52)	Memorandum in opposition to motion to dismiss. Plaintiff.
4/4/84	[no number]	Reply Memorandum in support of motion to dismiss. Defendant.
4/23/84	53)	Minute order: Court denies Defendant's motion to dismiss.
4/27/84	54)	Order denying Defendant's motion to dismiss count two of first amended complaint.
5/4/84	55)	Filed Defendant's answer to first amended complaint and demand for jury trial.
6/6/84	56)	Stipulation and order amending Shell protective order.
6/12/84	57)	Joint report of early meeting.
6/12/84	58)	Statement pursuant to local rule 6. Defendant.
6/13/84	59)	Statement pursuant to local rule 6. Plaintiff.
7/16/84	[no number]	Filed reporter's transcripts of proceedings.
11/1/84	62)	Joint stipulation and respective contentions of propounding and responding parties to Plaintiff's motion to compel production of documents. Plaintiff.
11/26/84	64)	Plaintiff's motion to compel production of documents granted in part and denied in part (minute order).

12/17/84	[no number]	Filed reporter's transcript of proceedings taken on 11/26/84.
3/26/85	65)	Filed Defendant's notice of motion and motion of Defendant to compel discovery 4/15/85 10 a.m.
4/5/85	67)	Plaintiff's opposition to Defendant's motion to compel discovery 4/15/85 10 a.m.
4/5/85	68)	Notice of taking deposition of ARCO on 4/24/85 2 p.m. Plaintiff.
4/5/85	69)	Notice of taking deposition of J.D. Kowal on 4/24/85. Plaintiff.
4/11/85	70)	Reply memorandum in support of defendant's motion to compel discovery 4/15/85 10 a.m.
4/12/85	71)	Notice of withdrawal of motion to compel discovery. Defendant.
11/5/85	74)	Joint status report.
11/15/85	75)	Minute order: Status conference continued to 6/23/86 for further status conference after discovery.
12/4/85	76)	Reporter's transcript of proceedings taken on 11/15/85.
4/4/86	79)	Under seal/notice of motion of Defendant ARCO for partial summary judgment; memorandum in support.
4/4/86	80)	Under seal/declaration and appendices submitted in support of Defendant ARCO's motion for partial summary judgment.

4/28/86	82)	Stipulation and order that count two of USA's amended complaint is dismissed with prejudice and without costs to either party; USA shall have by 6/16/86 to serve its opposition to ARCO's summary judgment motion addressed to count one of the amended complaint and ARCO shall have by 7/16/86 to serve its reply; the argument on the motion is continued until a date to be determined after USA files its opposition.
6/9/86	83)	Notice of motion for a pretrial order et al 6/30/86 10 a.m. Lodged Statement Order.
6/9/86	84)	Appendices submitted in support of motion for a pretrial order et al. Lodged Statement Order.
7/25/86	88)	Plaintiff's statement of genuine issues in opposition to Defendant's motion for a pretrial order.
7/25/86	89)	Plaintiff's opposition to Defendant's motion for a pretrial order.
8/25/86	90)	Notice of errata for Defendant ARCO's reply memorandum in support of motion for a pretrial order.
8/22/86	91)	Reply memorandum in support of motion for a pretrial order et al.
9/26/86	93)	Joint status report for upcoming status conference.
10/2/86	94)	Minute order: status conference and motion of Defendant for a pretrial order continued to 10/14/86 2:30 p.m.

10/14/86	95)	Minute order: Status conference on Defendant's motion for pretrial order defining relevant product market and determining legal sufficiency of Plaintiff's Sherman Act Section 1 claim; motion is taken under submission; Court orders court reporter to prepare a copy of today's transcript as soon as possible.
1/5/87	96)	Plaintiff's memorandum re *Cargill Inc. v. Monfort of Colorado, Inc.*
12/29/86	97)	Memo citing the Supreme Court's *Cargill* opinion decided after oral argument on ARCO's summary judgment motion.
1/9/87	98)	Defendant's response to Plaintiff's *Shipman* letter and *Cargill* memorandum.
1/15/87	99)	USA's memorandum in reply to ARCO's response to Plaintiff's *Shipman* letter and *Cargill* memorandum.
2/19/87	100)	Pretrial order specifying uncontroverted facts and determining the legal sufficiency of Plaintiff's Sherman Act case. Court finds that there is no just reason for delay and accordingly directs the entry of a final judgment dismissing the first count of the complaint, which pertains to the alleged violation. (Entered 2/25/87). Mail copies.
2/27/87	101)	[Plaintiff USA's] notice of appeal to the 9th Circuit Court of Appeals from judgment entered 2/25/87. Paid $70 filing and docket fee.

4/2/87	102)	Stipulation and order: all proceedings in this court with respect to counts three through ten of the amended complaint are stayed until after the resolution of USA's appeal of the dismissal of count one. (Entered 4/2/87). Mailed copies to all parties.
4/3/87	103)	Final judgment pursuant to Federal Rule of Civil Procedure 54(b). Plaintiff takes nothing as against Defendant under Plaintiff's Sherman Act § 1 claim which is set forth in the first count of the complaint, and that the first count of the complaint be dismissed on the merits and with prejudice. This judgment shall be deemed entered nunc pro tunc as of 2/25/87. (Entered 4/9/87). Mailed copies to all parties with notice of entry stamped.
4/15/87	[no number]	Forwarded to Ninth Circuit Court of Appeals reporter's transcripts of proceedings held on 10/31/83, 4/23/84 and 10/14/86.
1/13/89	[no number]	Lodged from Ninth Circuit Court of Appeals – is now ordered and hereby is reversed and remanded.
1/19/89	106)	Notice of hearing on filing and spreading the judgment 2/16/89 10 a.m.
2/16/89	107)	Minute order: Court orders that mandate of 9th Circuit Court of Appeals reversing and remanding appeal is hereby filed and spread upon the minutes of this United States District Court. (Entered 2/16/89). Mailed copies/Mailed notice.

2/16/89	108)	Stipulation and order that all proceedings in this case are stayed until after Supreme Court rules on petition for certiorari.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

USA PETROLEUM COMPANY, Plaintiff

v. No. 83-3508-WPG (Bx)

ATLANTIC RICHFIELD COMPANY, Defendant

FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR VIOLATIONS OF FEDERAL ANTITRUST AND STATE TRADE REGULATION LAWS AND DEMAND FOR JURY TRIAL

Dated January 30, 1984

The above-named plaintiff, through its attorneys, files this complaint against the above-named defendant and, demanding trial by jury, complains and alleges as follows:

COUNT ONE

(CONSPIRACY TO RESTRAIN TRADE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT)

I.

JURISDICTION AND VENUE

1. This count is filed and these proceedings are instituted by the above-named plaintiff against the above-named defendant under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to secure damages and injunctive relief from the above-named defendant for its violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, as hereinafter alleged.

2. Defendant maintains an office, transacts business and may be found within the Central District of California. The alleged unlawful acts and violations described below were in part conceived, carried out and made effective within the Central District of California. The interstate trade and commerce described herein and affected by the violations alleged herein are carried on in material part within the Central District of California.

II.

THE PARTIES

3. Plaintiff USA Petroleum Company ("USA") is a limited partnership with its principal place of business in Santa Monica, California. USA is the successor in interest to USA Petroleum Corporation as of December 31, 1982. USA is an independent marketer of refined gasoline and other petroleum products. USA sells such products at retail under the brand name USA. USA is also engaged to a lesser extent in the business of refining crude oil into gasoline and other petroleum products. USA does business in the state of California and elsewhere in the United States.

4. Defendant Atlantic Richfield Company ("Arco") is a corporation duly organized and existing under the laws of the state of Pennsylvania. Its principal office and place of doing business is located at 515 South Flower Street, Los Angeles, California 90071. Arco is a major integrated oil company engaged in the business of producing, purchasing and exchanging crude oil; manufacturing and refining crude oil into a number of refined petroleum products, including gasoline; transporting

crude oil and refined petroleum products; and wholesaling and retailing refined petroleum products. Arco does business in the state of California and elsewhere in the United States.

III.

ADDITIONAL CO-CONSPIRATORS

5. Various other companies and individuals not made defendants herein have participated willingly or unwillingly as co-conspirators in the violations alleged herein and have performed acts and/or made statements in furtherance thereof.

IV.

TRADE AND COMMERCE AFFECTED

6. Trade and commerce in gasoline is a significant element of trade and commerce in the state of California, in the western United States and throughout the United States.

7. The term "western United States" is used herein to refer to the states of Arizona, Nevada, California, Oregon, Washington, Alaska and Hawaii. These seven states comprise "PADD-V," one of five geographic districts within the United States established in 1950 by the Petroleum Administration for Defense.

8. Gasoline is marketed at the retail level primarily through service stations. Gasoline represents approximately 90%, in terms of dollar value, of the refined petroleum products sold through service stations.

9. Gasoline traditionally has been marketed by two distinct types of vendors: the major integrated oil companies ("the majors") and independent marketers ("independents"). The majors consist of a small number of fully integrated enterprises which are among the largest industrial corporations in the United States and the world. Arco is one of the majors. The independents consist of smaller companies that are not fully integrated and are generally dependent upon others for their supplies of crude oil and/or refined petroleum products. Plaintiff is an independent.

10. The production of crude oil and the refining and distribution of gasoline at all times material hereto have been dominated by the majors. The majors generally have not engaged in active price competition among themselves. Instead, they charge identical, or virtually identical, prices and rely heavily on advertising; well-located, newly-constructed and well-maintained stations; and the offering of various automotive and convenience services to attract customers.

11. Arco markets gasoline at the wholesale level to, among others, (a) "branded distributors" who resell it to service stations which market it under the Arco brand name and to (b) independent, "rebrand" or "unbranded" distributors such as the plaintiff, which market it under their own brand names rather than Arco's. The price at which Arco sells gasoline to these wholesale purchasers is called the "rack" price.

12. Arco also markets gasoline through Arco-controlled operations directly to branded retail outlets.

Approximately 65% of Arco-branded stations are supplied directly through Arco. The price at which Arco sells to retail outlets is called the "dealer tank wagon" price.

13. There are some 7,000 Arco-branded stations nationwide. These include (a) stations owned by Arco itself and operated by Arco employees, (b) stations owned by Arco itself and operated by a lessee-dealer, and (c) stations owned and operated by dealers who use Arco's brand name product pursuant to licensing or franchise agreements.

14. Prior to the changes in Arco's marketing practices described below, independent marketers such as the plaintiff represented the discount segment of gasoline retailing. They have traditionally engaged in low-overhead, high-volume, discount-price gasoline retailing. Since they have persistently sold gasoline at prices less than those charged by the major oil companies, the independents have been a significant procompetitive force in the marketplace.

15. The discount segment of the gasoline market is well-recognized by both the industry and the public as a separate, distinct and identifiable retail market or submarket generally characterized by distinct low prices, cash only sales (*i.e.*, no credit cards), distinct customers (*i.e.*, price conscious consumers) and distinct vendors selling largely through self-service stations.

16. As indicated above, independent marketers, including plaintiff, are dependent upon others for their supplies of crude oil and/or refined products. They are particularly dependent on independent refiners for their supplies of gasoline. A steady and adequate supply of

crude oil and refined products is critical to the viability and competitive effectiveness of independents generally and plaintiff specifically. Plaintiff's refining capacity is not adequate to meet its refined product needs, and it therefore depends heavily on outside suppliers, particularly independent refiners.

17. Plaintiff and its USA stations compete directly with Arco and Arco-branded stations at many locations in California and the western United States. Plaintiff is also a purchaser of refined petroleum products, including gasoline, from Arco.

18. For the last few years, there has been, and still is, a steady and continuous reduction in the competitive effectiveness of independent refiners and marketers selling in California and the western United States. During this time period, more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independent retail stations have been closed. The barriers to entry into this market have been high, and today such barriers are effectively insurmountable; once an independent is eliminated, it is highly unlikely that it will be replaced.

19. Prior to the conduct alleged herein, Arco sold very little gasoline in the discount market under its own brand name. In or around the spring of 1982, Arco made dramatic changes in the manner in which it markets gasoline and entered the discount market in direct head-to-head competition with discounters such as plaintiff. Among other things, Arco drastically lowered its prices and in other ways sought to appeal to price-conscious consumers.

20. The conduct of Arco as alleged herein is accelerating the reduction in the number and competitive effectiveness of independent marketers and independent refiners on whom they depend, and now threatens the viability of remaining independent marketers and refiners generally and of plaintiff specifically.

21. As a result of the unlawful activities alleged herein, the amount of gasoline sold by Arco in the state of California alone has risen 60% from 80 million gallons per month as of January 1982 to 130 million gallons per month as of January 1983 largely, if not entirely, at the expense of independents such as plaintiff.

22. Since the commencement of the conduct alleged herein and as a direct result of that conduct, Arco had captured approximately 45% of the discount market in California and 39% of the discount submarket in the western United States, as of October 1983, and its share is increasing. During this same period, Arco's rank as a gasoline retailer in California jumped from fourth to first place.

23. During the period covered by this complaint, there has been a steady and continuous flow in interstate commerce of both crude oil and refined petroleum products, including the crude oil and refined petroleum products bought and sold by the parties hereto.

V.

OFFENSES ALLEGED

24. Since approximately the spring of 1982 and continuing through the date hereof, Arco, its Arco-branded

distributors, Arco-branded retailers and others have been engaged in an unlawful combination and conspiracy to restrain trade and commerce in gasoline in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

25. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been (a) to fix, stabilize and maintain the retail price of gasoline sold by Arco and by Arco-branded stations to the consuming public in the state of California and in the western United States, and (b) to eliminate independent marketers and the competitive force they represent in the sale of gasoline.

26. As part of and in furtherance of this continuing combination and conspiracy, Arco and its co-conspirators have engaged in numerous acts and practices not all of which are presently known to plaintiff but which include without limitation the acts and practices set forth in the following paragraphs 27 through 38.

27. Arco and its co-conspirators have organized a resale price maintenace scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels. This resale price maintenance scheme has been effected, at least in part, through the use of temporary volume allowances ("TVA's"), temporary competitive allowances ("TCA's") and other price allowances extended by Arco to its branded distributors

and dealers. Such allowances have the effect of facilitating control by Arco of the resale prices charged by its branded distributors and dealers.

28. Arco and its co-conspirators have implemented severe and predatory price cuts.

29. Arco has extended to its co-conspirators and others prices on gasoline which are below cost. These prices have facilitated the maintenance of retail prices at artificially low and uncompetitive levels.

30. Arco has extended to its co-conspirators and others prices on gasoline which, even if not below cost, are uncompetitively low and would not be maintained by a normal, profit-maximizing firm. These prices have facilitated the maintenance of retail prices at artificially low and uncompetitive levels.

31. Arco and its co-conspirators have engaged in limit pricing practices in which prices are deliberately set on gasoline at a level below their competitors' cost with the purpose and effect of making it impossible for plaintiff and other independents to compete. For example, Arco and its co-conspirators have sold gasoline, ex tax, at the retail pump for less than independents, such as plaintiff, can purchase gasoline at wholesale.

32. Arco has artificially manipulated crude oil transfer prices and has deliberately underpaid federal windfall profit taxes and state taxes so as to subsidize the maintenance of artificially low gasoline prices.

33. Arco has offered to purchase, and has purchased, crude oil and/or wholesale gasoline at high, spot market prices in order to satisfy excess demand created

by its and its co-conspirators' artificially low gasoline prices rather than raising its own gasoline prices to competitive levels or allowing its co-conspirators to do so. The results of such offers and purchases are, *inter alia*, to drive up the price of crude oil and wholesale gasoline to independent refiners and marketers and to deprive them of a normal and essential source of supply.

34. Arco has limited the amount of gasoline to be sold to independent marketers or has refused to sell to them at all while supplying Arco-branded dealers with their full requirements, even though the independents, including plaintiff, are willing to pay more at wholesale than the Arco-branded dealers are selling at retail ex tax.

35. Arco and its co-conspirators have engaged in various forms of price discrimination, all of which facilitate the destruction of competition from independent marketers. These are described more particularly in Count Three below.

36. Arco has granted, and its dealers and distributors have accepted, discriminatory and unlawful rebates and unearned discounts, including TVA's and TCA's, as described more particularly in Count Seven below.

37. Arco has solicited its dealers and distributors to participate or acquiesce in the conspiracy and has used threats, intimidation and coercion to secure compliance with its terms. Arco has, among other things, solicited dealers to lower their prices in conformity with Arco's marketing scheme and has also coerced, and attempted to coerce, them to do so by threatening them with reductions in supply, revocation or reduction of discounts,

termination of their licenses, operating agreements or franchises and other adverse economic consequences.

38. Arco has deterred and dissuaded independents who have been adversely affected by the conspiracy from filing suit or otherwise taking action to disrupt or terminate the conspiracy.

39. As a direct and proximate result of the above-described combinations and conspiracy and of the acts taken in furtherance thereof:

(a) the price of gasoline has been artificially fixed, maintained and stabilized;

(b) independent refiners and marketers have suffered substantial losses of sales and profits and their ability to compete has been seriously impaired;

(c) independent refiners and marketers have gone out of business or been taken over by Arco;

(c) there is an immediate and growing probability that the independent segment of the industry will be destroyed altogether and that control of the discount market will be acquired by Arco.

VI.

INJURY TO PLAINTIFF

40. As a direct and proximate result of the violations of law alleged herein, and each of them, plaintiff has been and continues to be injured in that:

(a) it has lost sales it otherwise would have made and it will continue to sustain greater losses if defendant's illegal conduct is not enjoined;

(b) its profits on those sales which it has made have been reduced because it has been forced to

reduce its prices below what they otherwise would have been and it will continue to sustain greater losses if defendant's illegal conduct is not enjoined;

(c) its costs of doing business have been increased and will continue to be increased even more if defendant's illegal conduct is not enjoined;

(d) it has sustained a loss in the value of its business and in the goodwill thereof and it will sustain even greater losses if defendant's illegal conduct is not enjoined;

(e) it is threatened with substantial and irreparable injury, including the prospect of being forced to curtail refining operations, close retail stations or go out of business altogether, if defendant's illegal conduct is not enjoined.

41. The amount of plaintiff's monetary injuries is not presently known or calculable but is believed to be accruing at a rate in excess of $800,000 per month. When plaintiff has ascertained the amount of its damages, it will ask leave of Court to amend its complaint to state such amount.

COUNT TWO

(ATTEMPT TO MONOPOLIZE IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT)

42. This count is filed and these proceedings are instituted under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to secure damages and injunctive relief from Arco for its violations of Section 2 of the Sherman Act.

43. Plaintiff hereby incorporates by reference paragraph 2 as though fully set forth herein.

II.

THE PARTIES AND CO-CONSPIRATORS

44. Plaintiff hereby incorporates by reference paragraphs 3 through 5 as though fully set forth herein.

III.

TRADE AND COMMERCE

45. Plaintiff hereby incorporates by reference paragraphs 6 through 23 as though fully set forth herein.

IV.

OFFENSES CHARGED

46. Since approximately the spring of 1982, Arco has been engaged in an attempt to monopolize the distribution and sale of gasoline in and to the gasoline discount market in California and the western United States, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

47. As part of this attempt to monopolize, Arco has, with the specific intent to eliminate and exclude plaintiff and other independent marketers as competitors and to attain the power to control prices and/or exclude competition, engaged in numerous acts and practices and has induced and/or coerced others to engage in acts and practices, not all of which are presently known to plaintiff, but which include without limitation the acts and practices alleged in paragraphs 27 through 38 of this complaint, each of which is hereby incorporated by reference as though fully set forth herein. Those acts and

practices give rise to a dangerous probability that Arco will succeed in its attempt to monopolize.

48. Arco's attempt to monopolize as alleged herein has had, and continues to have, the effects alleged in paragraph 39, which is hereby incorporated by reference as though fully set forth herein.

V.

INJURY TO PLAINTIFF

49. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT THREE

(PRICE DISCRIMINATION IN VIOLATION OF THE ROBINSON-PATMAN ACT)

I.

JURISDICTION AND VENUE

50. This count is filed and these proceedings instituted for violations of Section 2(a) of the Clayton Act, commonly known as the Robinson-Patman Act, 15 U.S.C. § 13(a).

51. Plaintiff hereby incorporates by reference paragraph 2 as though fully set forth herein.

52. Arco is engaged in interstate commerce as that term is defined by 15 U.S.C. § 12 and some of the sales transactions involved in the price discriminations alleged herein extend across state boundaries and are occurring in interstate commerce.

II.

THE PARTIES AND CO-CONSPIRATORS

53. Plaintiff hereby incorporates by reference paragraphs 3 through 5 as though fully set forth herein.

III.

TRADE AND COMMERCE AFFECTED

54. Plaintiff hereby incorporates by reference paragraphs 6 through 38 as though fully set forth herein.

IV.

OFFENSES ALLEGED

55. Since approximately the spring of 1982, Arco has engaged in geographic price discrimination between different Arco-branded dealers purchasing gasoline of like grade and quality and between different Arco-branded distributors purchasing gasoline of like grade and quality. This discrimination has been effected, at least in part, through a "zone pricing" system under which, at any one point in time, Arco sells gasoline at different prices depending on the location of the retail service station through which the product is sold to the consuming public. Arco has established approximately eight hundred (800) or more pricing zones in the United States, over one hundred (100) of which are in California. These are defined so as to target independent marketers and destroy them as effective competitors. Prices vary from zone to zone. The precise number and boundaries of the zones are not disclosed to plaintiff, to other wholesale

customers or to the public. Both the number and boundaries of the zones are constantly fluctuating at Arco's discretion.

56. Accordingly, since at least the spring of 1982, Arco has been and is still selling gasoline at lower prices in certain locations, sections and areas within and outside of California than in others, thereby discriminating among and between such locations, sections and areas, and between purchasers in such locations, sections and areas.

57. Further, since approximately the spring of 1982, Arco has engaged and continues to engage in price discrimination between different wholesale customers purchasing gasoline of like grade and quality. Arco has extended prices to its branded distributors which are more favorable than those extended to independent or unbranded wholesale customers, such as plaintiff.

58. In addition, Arco has engaged in price discrimination between its wholesale customers and retail dealers. Arco has extended prices to certain branded dealers in California and in other states which have actually been lower than its rack (*i.e.*, wholesale) prices, thus discriminating between such customers and effectuating a wholesale-retail price squeeze.

59. In each of the offenses described in paragraphs 55 through 58, Arco has engaged in various forms of price discrimination and has made sales, reasonably contemporaneous, of gasoline of like grade and quality at different prices to different customers located in different states for use, consumption or resale within the United States.

60. The purpose and effect of the foregoing discriminations, individually and collectively, are to lessen and substantially injure and destroy competition by and between Arco, its branded distributors and its branded stations, on the one hand, and independent distributors and retailers, on the other.

61. Plaintiff hereby incorporates by reference paragraph 39 as though fully set forth herein.

V.

INJURY TO PLAINTIFF

62. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT FOUR

(CONSPIRACY TO RESTRAIN TRADE IN VIOLATION OF CAL. BUS. & PROF. CODE § 16700 *ET SEQ.*)

63. This count is filed as a claim pendent to Counts One through Three to secure damages and injunctive relief from defendant for its violations of Sections 16700 *et seq.* of the California Business & Professions Code (the "Cartwright Act"). The claim asserted herein is ancillary to the federal antitrust claims set out in Counts One through Three and arises from the same transactions, circumstances and operative facts as those claims.

64. Plaintiff hereby incorporates by reference paragraphs 2 through 41 as though fully set forth herein.

COUNT FIVE

(BELOW COST SALES IN VIOLATION OF CAL. BUS. & PROF. CODE §§ 17043, 17049)

65. This count is filed as a claim pendent to Counts One through Three to secure damages and injunctive relief from defendant for its violations of Sections 17043 and 17049 of the California Business & Professions Code. The claim asserted herein is ancillary to the federal antitrust claims set out in Counts One through Three and arises from the same transactions, circumstances and operative facts as those claims.

66. Plaintiff hereby incorporates by reference paragraphs 2 through 23 and 29 through 34 as though fully set forth herein.

67. Since at least the spring of 1982, Arco has advertised for sale, offered for sale and sold to Arco-branded wholesalers, Arco-branded dealers, Arco-owned service stations and other customers in California, gasoline at less than the cost thereof to Arco, in violation of Cal. Bus. & Prof. Code §§ 17043 and 17049.

68. Such advertising, offers and actual sales have been made for the purpose of injuring competitors, including specifically the plaintiff and other independent marketers, and of destroying competition from the plaintiff and other independent marketers.

69. As a fully integrated oil company, Arco acquires crude oil from its own exploration and production operations at artificially and arbitrarily established intra-company transfer prices without the actual payment of money. Since at least April 1982, these so-called prices

have failed to reflect the actual value of such crude oil. Further, since at least the spring of 1982, Arco's transfer prices have failed to include the correct amount of windfall profits tax and other taxes owed by Arco on its crude oil.

70. For the foregoing and other reasons, pursuant to Cal. Bus. & Prof. Code § 17077, the cost of crude oil is presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which they were acquired at the time of the acquisition. By this measure, Arco sales at various locations in California have been below cost.

71. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT SIX

(LOCALITY DISCRIMINATION IN VIOLATION OF CAL. BUS. & PROF. CODE §§ 17040, 17049)

72. This count is brought as a claim pendent to Counts One through Three to secure damages and injunctive relief from defendant for its violations of Sections 17040 and 17049 of the California Business & Professions Code. The claim asserted herein is ancillary to the federal antitrust claims set out in Counts One through Three and arises from the same transactions, circumstances and operative facts as those claims.

73. Plaintiff hereby incorporates by reference paragraphs 2 through 23, 56, 57 and 60.

74. The discrimination described in paragraphs 56 and 57 above is done with the intent to destroy the

competition of plaintiff, who is a regular, established dealer in gasoline and of others who are or intend to become such dealers, and constitutes a locality discrimination in violation of Cal. Bus. & Prof. Code §§ 17040 and 17049.

75. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT SEVEN

(SECRET REBATES AND UNEARNED DISCOUNTS IN VIOLATION OF CAL. BUS. & PROF. CODE §§ 17045, 17049)

76. This count is filed as a claim pendent to Counts One through Three to secure damages and injunctive relief from defendant for its violations of Sections 17045 and 17049 of the California Business & Professions Code. The claim asserted herein is ancillary to the federal antitrust claims set out in Counts One through Three and arises from the same transactions, circumstances and operative facts as those claims.

77. Plaintiff hereby incorporates by reference paragraphs 2 through 23 and 36 as though fully set forth herein.

78. Since at least the spring of 1982, Arco has selectively and discriminatorily offered and secretly granted rebates, refunds, commissions and unearned discounts to some of its Arco-branded distributors and dealers in violation of Cal. Bus. & Prof. Code §§ 17045 and 17049.

79. Such rebates, refunds, commissions and unearned discounts have been extended through TVA's, TCA's and other devices.

80. Such rebates, refunds, commissions and unearned discounts have not been extended to all Arco-branded distributors and dealers who otherwise constitute classes of purchasers purchasing upon like terms and conditions.

81. Arco's selective and discriminatory payment and allowance of secret rebates, refunds, commissions and unearned discounts is intended to and does operate to the injury of competitors of Arco, including the plaintiff and other independent marketers and, further, tends to destroy competition between Arco or Arco-branded stations on the one hand and independent marketers of gasoline on the other.

82. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT EIGHT

(SOLICITATION OF VIOLATIONS AND ENFORCEMENT THROUGH THREATS, INTIMIDATION AND BOYCOTTS IN VIOLATION OF CAL. BUS. & PROF. CODE §§ 17046, 17047)

83. This count is brought as a claim pendent to Counts One through Three to secure damages and injunctive relief from defendant for its violations of Sections 17046 and 17047 of the California Business & Professions Code. The claim asserted herein is ancillary to the federal antitrust claims set out in Counts One through Three and

arises from the same transactions, circumstances and operative facts as those claims.

84. Plaintiff hereby incorporates by reference paragraphs 2 through 23, 37 and 38 as though fully set forth herein.

85. In undertaking the unlawful acts and practices alleged in each of the foregoing pendent Counts Four through Seven of this complaint, Arco has, in violation of Cal. Bus. & Prof. Code § 17047, solicited distributors and dealers of Arco-branded gasoline to commit and to participate jointly with Arco in the commission of illegal below cost sales, loss leader sales, locality discrimination, secret rebates and other violations of the California Unfair Practices Act alleged above.

86. Further, to effectuate the unlawful acts and practices alleged in each of the foregoing pendent counts of this complaint, Arco has used threats, intimidation and boycotts against distributors and dealers of Arco-branded gasoline in violation of Cal. Bus. & Prof. Code § 17046.

87. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT NINE

(PRICE DISCRIMINATION IN THE SALE OF MOTOR VEHICLE FUELS IN VIOLATION OF BUS. & PROF. CODE § 21200)

88. This count is filed as a claim pendent to Counts One through Three to secure damages and injunctive relief from defendant for its violations of Section 21200 of the California Business & Professions Code. The claim

asserted herein is ancillary to the federal antitrust claims set out in Counts One through Three and arises from the same transactions, circumstances and operative facts as those claims.

89. Plaintiff hereby incorporates by reference paragraphs 2 through 23, 35, 55 through 60 and 74 as though fully set forth herein.

90. Since at least the spring of 1982, Arco has discriminated directly or indirectly and continues to discriminate directly or indirectly in price between different purchasers of motor vehicle fuels of like grade and quality in violation of Cal. Bus. & Prof. Code § 21200.

91. Plaintiff hereby incorporates by reference paragraphs 40 and 41 as though fully set forth herein.

COUNT TEN

(UNFAIR COMPETITION IN VIOLATION OF BUS. & PROF. CODE § 17200 *ET SEQ.* AND COMMON LAW)

92. This count is filed as a claim pendent to Counts One through Three to secure restitution, injunctive relief and damages from defendant for its violations of Section 17200 *et seq.* of the California Business & Professions Code and the common law of unfair competition.

93. Plaintiff hereby incorporates by reference paragraphs 2 through 41, 46 through 48, 55 through 60, and 63 through 91 as though fully set forth herein.

94. Since at least the spring of 1982, Arco has been engaged in a deliberate plan and program to reduce and ultimately eliminate competition from independent marketers in California. This plan and program, and the

individual elements thereof, constitute violations of Cal. Bus. & Prof. Code § 17200 *et seq.* and the common law of unfair competition.

95. Arco's anticompetitive plan and program consist of numerous elements, not all of which are presently known to plaintiff but which include engaging in the acts, practices and violations of law alleged in Counts One through Nine above and described more particularly therein and incorporated herein by reference.

PRAYER FOR RELIEF

Wherefore, plaintiff prays that the Court grant it the following relief:

1. That the Court adjudge and decree that defendant has violated and is violating Sections 1 and 2 of the Sherman Act;

2. That the Court adjudge and decree that defendant has violated and is violating Section 2(a) of the Clayton Act;

3. That the Court adjudge and decree that defendant has violated and is violating California law as alleged in the pendent counts;

4. That a preliminary and permanent injunction be issued enjoining defendant and its officers, agents, employees and all persons in active concert and participation with it from engaging in the unlawful conduct and practices alleged in this complaint and that appropriate equitable relief be entered to dissipate the effects of the unlawful conduct and practices;

5. That judgment be entered on Counts One through Three for three times the amount of damages suffered by plaintiff as required by Section 4 of the Clayton Act, 15 U.S.C. § 15.

6. That judgment be entered on Counts Four through Nine for three times the amount of damages suffered by plaintiff as required by Cal. Bus. & Prof. Code §§ 16750, 17082 and 21202;

7. That judgment be entered on Count Ten awarding plaintiff restitution and damages on the injuries suffered by it as provided by Cal. Bus. & Prof. Code §§ 17200 *et seq.* and by common law;

8. That plaintiff be awarded its reasonable attorneys' fees and costs of suit as required by Section 4 of the Clayton Act, 15 U.S.C. § 15, and by Cal. Bus. & Prof. Code §§ 16750, 17082 and 21202;

9. That plaintiff be awarded legal interest on damages recovered;

10. That plaintiff be awarded such other and further relief as the Court may deem proper.

DATED: January 30, 1984.

BLECHER, COLLINS & WEINSTEIN
MAXWELL M. BLECHER
CONSUELO S. WOODHEAD
NORMAN PINE
SYLVIA P. GOTTLIEB

By /s/ Sylvia P. Gottlieb
SYLVIA P. GOTTLIEB
Attorneys for Plaintiff

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury.

DATED: January 30, 1984.

BLECHER, COLLINS & WEINSTEIN
MAXWELL M. BLECHER
CONSUELO S. WOODHEAD
NORMAN PINE
SYLVIA P. GOTTLIEB

By /s/ Sylvia P. Gottlieb
SYLVIA P. GOTTLIEB
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ATLANTIC RICHFIELD'S ANSWER TO FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Dated May 3, 1984
[Caption Omitted in Printing]

Defendant Atlantic Richfield Company ("Atlantic Richfield") by its attorneys, answers the First Amended Complaint herein (the "Complaint") as follows:

AS TO COUNT ONE

1. Denies each and every allegation contained in paragraph 1 of the Complaint, except admits that plaintiff purports to file this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for damages and injunctive relief for alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Denies each and every allegation contained in paragraph 2 of the Complaint, except admits that Atlantic Richfield maintains an office, transacts business, and may be found within the Central District of California.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 3 of the Complaint, except admits that USA does business in the state of California and elsewhere in the United States.

4. Denies each and every allegation contained in paragraph 4 of the Complaint, except admits that Atlantic Richfield is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, that its principal office and place of doing business is located at 515 South Flower Street, Los Angeles, California 90071, and that it is engaged in the business of producing, purchasing and exchanging crude oil, refining crude oil into refined petroleum products, including gasoline, transporting crude oil and refined petroleum products, and selling refined petroleum products to resellers and end-users, and that it does business in the State of California and elsewhere in the United States.

5. Denies each and every allegation contained in paragraph 5 of the Complaint.

6. Admits the allegations contained in paragraph 6 of the Complaint.

7. Denies each and every allegation contained in paragraph 7 of the Complaint, except admits that the plaintiff purports to define the term "western United States" as used in the Complaint and that "PADD-V" includes the States of Arizona, Nevada, California, Oregon, Washington, Alaska, and Hawaii.

8. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 8 of the Complaint.

9. Denies each and every allegation contained in paragraph 9 of the Complaint, except admits that a number of enterprises which are among the largest industrial corporations in the United States and the world market gasoline.

10. Denies each and every allegation contained in paragraph 10 of the Complaint.

11. Denies each and every allegation contained in paragraph 11 of the Complaint, except admits that Atlantic Richfield sells gasoline to branded distributors, that some of this gasoline is resold to service stations which market it under the "ARCO" brand name, and that Atlantic Richfield has sold gasoline to unbranded distributors.

12. Denies each and every allegation contained in paragraph 12 of the Complaint, except admits that Atlantic Richfield sells gasoline directly to some ARCO-branded retail outlets.

13. Denies each and every allegation contained in paragraph 13 of the Complaint.

14. Denies each and every allegation contained in paragraphs 14 and 15 of the Complaint.

15. Denies each and every allegation contained in paragraph 16 of the Complaint, except states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the adequacy of the plaintiff's refining capacity to meet its refined product needs.

16. Denies each and every allegation contained in paragraph 17 of the Complaint, except admits that on occasion plaintiff has purchased gasoline from Atlantic Richfield.

17. Denies each and every allegation contained in paragraph 18 of the Complaint.

18. Denies each and every allegation contained in . paragraph 19 of the Complaint, except admits that Atlantic Richfield seeks and has sought to appeal to price-conscious consumers.

19. Denies each and every allegation contained in paragraphs 20 through 22 of the Complaint.

20. Denies each and every allegation contained in paragraph 23 of the Complaint, except admits that some crude oil and some refined petroleum products bought and sold by Atlantic Richfield have moved in interstate commerce.

21. Denies each and every allegation contained in paragraphs 24 through 34 of the Complaint.

22. Denies each and every allegation contained in paragraph 35 of the Complaint, except admits that plaintiff purports to describe certain acts more particularly in Count Three of the Complaint.

23. Denies each and every allegation contained in paragraph 36 of the Complaint, except admits that plaintiff purports to describe certain acts more particularly in Count Seven of the Complaint.

24. Denies each and every allegation contained in paragraphs 37 through 41 of the Complaint.g

AS TO COUNT TWO

25. Denies each and every allegation contained in paragraph 42 of the Complaint, except admits that plaintiff purports to file Count Two and institute these proceedings under Sections 4 and 16 of the Clayton Act, 15

U.S.C. §§ 15, 26, for violations of Section 2 of the Sherman Act.

26. With respect to paragraph 43 of the Complaint, repeats and realleges each and every admission and denial made with respect to paragraph 2 of the Complaint by paragraph 2 hereof, with the same force and effect as though here set forth in full.

27. With respect to paragraph 44 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 3 through 5 of the Complaint by paragraphs 3 through 5 hereof, with the same force and effect as though here set forth in full.

28. With respect to paragraph 45 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 6 through 23 of the Complaint by paragraphs 6 through 20 hereof, with the same force and effect as though here set forth in full.

29. Denies each and every allegation contained in paragraph 46 of the Complaint.

30. Denies each and every allegation contained in paragraph 47 of the Complaint, and repeats and realleges each and every admission, denial and statement made with respect to paragraphs 27 through 38 of the Complaint by paragraphs 21 through 24 hereof, with the same force and effect as though here set forth in full.

31. Denies each and every allegation contained in paragraph 48 of the Complaint, and repeats and realleges each and every denial made with respect to paragraph 39 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

32. With respect to paragraph 49 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT THREE

33. Denies each and every allegation contained in paragraph 50 of the Complaint, except admits that plaintiff purports to file Count Three and institute these proceedings for violations of Section 2(a) of the Clayton Act, commonly known as the Robinson-Patman Act, 15 U.S.C. § 13(a).

34. With respect to paragraph 51 of the Complaint, repeats and realleges each and every admission and denial made with respect to paragraph 2 of the Complaint by paragraph 2 hereof, with the same force and effect as though here set forth in full.

35. Denies each and every allegation contained in paragraph 52 of the Complaint.

36. With respect to paragraph 53 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 3 through 5 of the Complaint by paragraphs 3 through 5 hereof, with the same force and effect as though here set forth in full.

37. With respect to paragraph 54 of the Complaint, repeats and realleges each and every admission, denial

and statement made with respect to paragraphs 6 through 38 of the Complaint by paragraphs 6 through 24 hereof, with the same force and effect as though here set forth in full.

38. Denies each and every allegation contained in paragraph 55 of the Complaint, except admits that Atlantic Richfield has established numerous price zones in various parts of the United States, including more than 100 such price zones in California.

39. Denies each and every allegation contained in paragraphs 56 through 60 of the Complaint.

40. With respect to paragraph 61 of the Complaint, repeats and realleges each and every denial made with respect to paragraph 39 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

41. With respect to paragraph 62 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT FOUR

42. Denies each and every allegation contained in paragraph 63 of the Complaint, except admits that plaintiff purports to file this Count Four as a claim pendent to Counts One through Three.

43. With respect to paragraph 64 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 2 through

41 of the Complaint by paragraphs 2 through 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT FIVE

44. Denies each and every allegation contained in paragraph 65 of the Complaint, except admits that plaintiff purports to file Count Five as a claim pendent to Counts One through Three.

45. With respect to paragraph 66 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 2 through 23 and 29 through 34 of the Complaint by paragraphs 2 through 21 hereof, with the same force and effect as though here set forth in full.

46. Denies each and every allegation contained in paragraphs 67 through 70 of the Complaint.

47. With respect to paragraph 71 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT SIX

48. Denies each and every allegation contained in paragraph 72 of the Complaint, except admits that plaintiff purports to bring Count Six as a claim pendent to Counts One through Three.

49. With respect to paragraph 73 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 2 through 23, 56, 57 and 60 of the Complaint by paragraphs 2 through 20 and 39 hereof, with the same force and effect as though here set forth in full.

50. Denies each and every allegation contained in paragraph 74 of the Complaint.

51. With respect to paragraph 75 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT SEVEN

52. Denies each and every allegation contained in paragraph 76 of the Complaint, except admits the plaintiff purports to file Count Seven as a claim pendent to Counts One through Three.

53. With respect to paragraph 77 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 2 through 23 and 36 of the Complaint by paragraphs 2 through 20 and 23 hereof, with the same force and effect as though here set forth in full.

54. Denies each and every allegation contained in paragraphs 78 through 81 of the Complaint.

55. With respect to paragraph 82 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT EIGHT

56. Denies each and every allegation contained in paragraph 83 of the Complaint, except admits the plaintiff purports to file Count Eight as a claim pendent to Counts One through Three.

57. With respect to paragraph 84 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 2 through 23, 37 and 38 of the Complaint by paragraphs 2 through 20 and 24 hereof, with the same force and effect as though here set forth in full.

58. Denies each and every allegation contained in paragraphs 85 and 86 of the Complaint.

59. With respect to paragraph 87 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT NINE

60. Denies each and every allegation contained in paragraph 88 of the Complaint, except admits the plaintiff purports to file Count Nine as a claim pendent to Counts One through Three.

61. With respect to paragraph 89 of the Complaint, repeats and realleges each and every admission, denial

and statement made with respect to paragraphs 2 through 23, 35, 55 through 60 and 74 of the Complaint by paragraphs 2 through 20, 22, 38, 39, and 50 hereof, with the same force and effect as though here set forth in full.

62. Denies each and every allegation contained in paragraph 90 of the Complaint.

63. With respect to paragraph 91 of the Complaint, repeats and realleges each and every denial made with respect to paragraphs 40 and 41 of the Complaint by paragraph 24 hereof, with the same force and effect as though here set forth in full.

AS TO COUNT TEN

64. Denies each and every allegation contained in paragraph 92 of the Complaint, except admits the plaintiff purports to file Count Ten as a claim pendent to Counts One through Three.

65. With respect to paragraph 93 of the Complaint, repeats and realleges each and every admission, denial and statement made with respect to paragraphs 2 through 41, 46 through 48, 55 through 60, and 63 through 91 of the Complaint by paragraphs 2 through 24, 29 through 31, 38 through 39, and 42 through 63 hereof, with the same force and effect as though here set forth in full.

66. Denies each and every allegation contained in paragraph 94 of the Complaint.

67. Denies each and every allegation contained in paragraph 95 of the Complaint and repeats and realleges each and every admission, denial and statement made

with respect to Counts One through Nine of the Complaint by paragraphs 1 through 63 hereof, with the same force and effect as though here set forth in full.

FIRST AFFIRMATIVE DEFENSE

68. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

69. This Court lacks jurisdiction over the subject matter of some or all of the claims asserted in the Complaint.

THIRD AFFIRMATIVE DEFENSE

70. Plaintiff lacks standing to maintain some or all of the claims asserted in the Complaint.

FOURTH AFFIRMATIVE DEFENSE

71. Some or all of the claims asserted in the Complaint are barred in whole or in part by the applicable statutes of limitations.

FIFTH AFFIRMATIVE DEFENSE

72. The Complaint fails to state any basis upon which equitable relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

73. Some or all of the claims asserted in the Complaint are barred in whole or in part by laches, waiver, estoppel, unclean hands or want of equity.

SEVENTH AFFIRMATIVE DEFENSE

74. To the extent that some or all of the claims asserted in the Complaint are concerned with matters that Congress has by statute entrusted to federal administrative agencies or that the State of Alaska has entrusted to its administrative agencies, they are barred.

EIGHTH AFFIRMATIVE DEFENSE

75. Atlantic Richfield has not violated Section 2 of the Sherman Act, 15 U.S.C. § 2, because its market position has resulted from business initiative and acumen, efficient operations, vigorous competition and the operation of governmental, economic, technical and other factors inherent in the nature of the petroleum industry.

NINTH AFFIRMATIVE DEFENSE

76. Any alleged injury suffered by plaintiff caused by any act of Atlantic Richfield or any alleged co-conspirators is not an injury of the type that the antitrust laws were designed to prevent.

TENTH AFFIRMATIVE DEFENSE

77. Any lost sales, lost profits, increased costs, loss in value of its business or in the goodwill thereof, or

other alleged injury suffered by plaintiff was caused by plaintiff's inability to compete effectively in the market for petroleum products and not by any act of Atlantic Richfield or any alleged co-conspirators.

ELEVENTH AFFIRMATIVE DEFENSE

78. Atlantic Richfield has not violated Section 1 or Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, because its prices were set at all times to meet the prices then charged by competitors.

79. Atlantic Richfield has not violated Section 2(a) of the Clayton Act, commonly known as the Robinson-Patman Act, 15 U.S.C. § 13(a), or any of the provisions of California law identified in Counts Four through Ten. In accordance with Section 2(b) of the Clayton Act, commonly known as the Robinson-Patman Act, 15 U.S.C. § 13(b), and provisions of California law including Cal. Bus. & Prof. Code §§ 21200 and 17050, Atlantic Richfield's prices at all times were set in good faith to meet the prices then charged, or in good faith believed to be charged, by competitors, and, in accordance with the above-cited provisions of California law, such prices were offered to all customers of Atlantic Richfield in competition with one another.

TWELFTH AFFIRMATIVE DEFENSE

80. Atlantic Richfield has not violated Section 2(a) of the Clayton Act, commonly known as the Robinson-Patman Act, 15 U.S.C. § 13(a), or any of the provisions of California law identified in Counts Four through Ten,

because Atlantic Richfield's prices at all times were set in good faith to make due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods by, and quantities in which, Atlantic Richfield sold or delivered its products.

THIRTEENTH AFFIRMATIVE DEFENSE

81. The Complaint should be dismissed for failure to join as parties additional persons required to be joined under Rule 19 of the Federal Rules of Civil Procedure.

WHEREFORE, Atlantic Richfield demands judgment dismissing the Complaint, together with the costs and disbursements of this action.

Dated: May 3, 1984

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF'S RESPONSES TO
DEFENDANT ATLANTIC RICHFIELD
COMPANY'S FIRST SET OF INTERROGATORIES

Dated July 7, 1984
[Caption Omitted in Printing]

* * *

INTERROGATORY NO. 5:

With respect to the allegation contained in paragraph 17 of the Complaint that "[p]laintiff and its USA stations compete directly with Arco and Arco-branded stations at many locations in California and the western United States," identify each USA retail gasoline station which you contend competes directly with Atlantic Richfield or one or more Arco-branded stations and as to each USA station identify each Arco-branded station with which it competes directly.

RESPONSE TO INTERROGATORY NO 5:

It is the plaintiff's position that all USA stations compete with and are affected to some extent by the conduct of Arco and Arco-branded stations in the relevant market. Plaintiff is currently in the process of reviewing the status of those Arco and Arco-branded stations that are of closest geographic proximity to USA stations and , therefore, may be considered to have the most direct and severe competitive impact.

* * *

INTERROGATORY NO. 9:

For each of the allegations of a "continuing agreement," "understanding" and "concert of action" contained in paragraph 25 of the Complaint, the allegations of a "resale price maintenance scheme," of an "agreement," and of "control by Arco of the resale prices" contained in paragraph 27 of the Complaint, the allegations that Atlantic Richfield "has solicited its dealers and distributors to participate or acquiesce in the conspiracy," and that it "has used threats, intimidation and coercion to secure compliance with its terms" contained in paragraph 37 of the Complaint, and the allegation that "the price of gasoline has been artificially fixed, maintained and stabilized" contained in paragraph 39(a) of the Complaint, separately state each fact and identify each document and each witness having information which you contend supports the allegation, state whether you intend to prove the truth of the allegation on a dealer-by-dealer basis, and, if you do not intend so to prove the allegation, state how you intend to prove it.

RESPONSE TO INTERROGATORY NO. 9:

Plaintiff objects to this interrogatory on the grounds that it is premature, unduly burdensome and harassing, as stated in the opening General Objections of this response, and on the further grounds that it is overly broad and a transparent attempt, with its multiple questions, to circumvent Local Rule 8.2.1 limiting the number of interrogatories that a party may serve on another. Without waiver of its objections, plaintiff answers that it will seek to prove the existence of a nationwide or regional conspiracy without proving the participation of

each individual dealer and that damages may be shown on other than a dealer-by-dealer basis. Plaintiff reserves the right to prove conspiracy and damages by any legally sufficient method that the evidence may support.

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF'S SUPPLEMENTAL RESPONSES TO DEFENDANT ATLANTIC RICHFIELD COMPANY'S FIRST SET OF INTERROGATORIES

Dated August 15, 1985
[Caption Omitted in Printing]

* * *

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:

As USA has previously stated, USA contends that all of its stations compete with and are affected by the conduct of ARCO and ARCO-branded stations. Due to the nature of ARCO's conduct as alleged in the Complaint, USA believes that the USA stations in closest geographic proximity to ARCO-branded stations may have been most directly and severely injured by ARCO's practices. USA has not completed its investigation of its damages caused by ARCO's conduct. In addition, ARCO has not yet produced all documents requested by USA relating, among other things, to ARCO's pricing practices and pricing zones and this has hampered USA's investigation on this subject. Finally, USA's position with respect to the impact and damage to USA as a result of ARCO's conduct and the conduct of ARCO-branded stations will be the subject of expert investigation and analysis that has not yet begun. Therefore, USA cannot definitively respond to this interrogatory at this time. However, USA has produced to ARCO for ARCO's information, a list of the USA stations in closest geographic proximity to ARCO-

branded stations, which stations USA believes may have been most directly impacted by the conduct alleged in the Complaint. The list was prepared by USA by identifying ARCO-branded stations considered by USA management to be most competitive with USA stations. The address information concerning the listed ARCO stations was drawn from a list of the identities and locations of ARCO-branded stations market produced by ARCO in this litigation and from the observations of USA field personnel. An updated and more complete list reflecting USA and ARCO stations open and in operation as of mid-August, 1985 is attached hereto as Exhibit "A" and is incorporated in this supplemental response by this reference.

* * *

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:

In its December 6, 1984 letter to USA's counsel ("the Thorner letter"), ARCO reformulated Interrogatory No. 9 as follows:

> "9. Separately state each fact and identify each document and each witness having information which you contend supports your contention that a resale price maintenance conspiracy involving Atlantic Richfield exists."

USA incorporates by reference and reasserts its general and specific objections to original Interrogatory No. 9 as equally applicable to the interrogatory as restated above. USA believes that its original response to the interrogatory was full and adequate. Nevertheless, without waiving such objections, USA additionally responds as follows:

USA has thus far based its contentions relating to the retail price maintenance conspiracy alleged in the complaint upon the inferences reasonably drawn from the pattern of ARCO's pricing conduct and the competitive price allowances given by ARCO to its dealers, that there was an agreement that the dealers to whom the allowances were given would lower their prices to undercut or meet the prices of independent dealers within the same ARCO pricing zones and that the allowances inevitably and inexorably caused them to do so. USA executives, particularly Mark Conant, were made aware by field personnel that ARCO stations were systematically pricing their gasolines below the prices of USA and other independents on an apparently fixed margin basis, keyed directly to the prices charged by the independents and apparently without regard to the ARCO dealers' costs or profits from such sales. Based upon the accumulated knowledge and experience of USA management that the major oil companies are able to and do induce and/or coerce their dealers to follow suggested prices, USA concluded that there was an express or implied understanding and conspiracy that the competitive price allowances being offered by ARCO were provided for the purpose and with the effect of heaving dealers set prices which would eliminate independents from the market.

USA is continuing to investigate and seek discovery of information related to its claims and continues to reserve the right to prove conspiracy and damages by any legally sufficient method that the evidence may support.

* * *

EXHIBIT "A"

USA Station No. and Location	ARCO Station and Location
1 – 9010 E. Broadway Temple City, CA	7280 Rosemead Temple City, CA
	1386 La Tunas Dr. Temple City, CA
4 – 422 S. Azusa Ave. Azusa, CA	100 N. Azusa Azusa, CA
	468 Arrow Hwy. Azusa, CA
5 – 340 N. Citrus Azusa, CA	701 S. Grand Azusa, CA
	468 Arrow Hwy Azusa, CA
6 – 4405 N. Main Baldwin Park, Ca	4258 N. Main Baldwin Park, CA
	13758 Los Angeles Baldwin Park, CA
12 – 1542 W. Willow Long Beach, CA	2601 Santa Fe Ave. Long Beach, CA
	200 Willow St. Long Beach, CA
20 – 2601 Road 20 San Pablo, CA	2550 Mission Blvd. San Pablo, CA
	12890 San Pablo Ave. San Pablo, CA
30 – 20354 E. Arrow Hwy. Covina, CA	1108 Grand Covina, CA
	701 S. Grand Covina, CA
	10306 Arrow Hwy. Covina, CA

USA Station No. and Location	ARCO Station and Location
40 – 3501 Jefferson Napa, CA	2303 Jefferson Napa, CA
51 – 3618 Baldwin El Monte, CA	9824 Flair Dr. El Monte, CA
	9666 Valley Blvd. El Monte, CA
55 – 1801 McHenry Ave. Modesto, CA	2101 Tully Rd. Modesto, CA
	1404 McHenry Modesto, CA
	2519 Coffee Modesto, CA
59 – 2651 N. Ventura Ave. Port Hueneme, CA	1050 N. Ventura Port Hueneme, CA
65 – 2500 W. Lodi Lodi, CA	501 Kettleman Ln. Lodi, CA
	801 Lower Sacramento Rd. Lodi, CA
70 – 25235 San Jacinto St. Hemet, CA	40730 W. Florida Hemet, CA
71 – 2661 E. Thompson Blvd. Ventura, CA	2580 Thompson Ventura, CA
	605 S. Mills Ventura, CA
72 – 794 N. Main Corona, CA	785 N. Main Corona, CA
73 – 15120 Hesperian Blvd. San Leandro, CA	15135 Hesperian San Leandro, CA
57 – 10700 MacArthur Blvd. Oakland, CA	10600 McCarter Blvd. Oakland, CA

USA Station No. and Location	ARCO Station and Location
58 – 737 Tennessee Vallejo, CA	640 Broadway Vallejo, CA
75 – 3625 W. Mineral King Visalia, CA	3611 S. Mooney Visalia, CA
76 – 5411 100th St. Tacoma, WA	10116 S. Tacoma Way Tacoma, WA
82 – 19443 W. Soledad Saugus, CA	26409 Sierra Hwy Saugus, CA
97 – 1802 Santa Monica Blvd. Santa Monica, CA	1801 Lincoln Santa Monica, CA
	1819 Cloverfield Santa Monica, CA
98 – 4395 Glencoe Ave. Marina del Rey, CA	2003 Lincoln Venice, CA
101 – 400 Greenbrae Dr. Sparks, NV	2191 Pyramid Sparks, NV
102 – 200 Serra Way Milpitas, CA	43 So. 4350 Abbot Ave. Milpitas, CA
103 – 1091 E. Capitol Expressway San Jose, CA	1100 Tully Rd. San Jose, CA
	2375 Quimby San Jose, CA
	3147 Center San Jose, CA
115 – 705 Rainier Ave. S. Renton, WA	621 Rainier Ave.S. Renton, WA
	161 Rainier Ave.S. Renton, WA
116 – 303 Southwest 148th Burien, WA	148 1st Ave.S.W. Burien, WA

USA Station No. and Location	ARCO Station and Location
120 – 1790 E. Pleasant Valley Rd. Oxnard, CA	4000 S. Saviers Oxnard, CA
121 – 4991 Stockton Blvd. Sacramento, CA	5399 Fruitridge Sacramento, CA
125 – 2633 Via Campo Montebello, CA	2430 Garfield Ave. Montebello, CA
	2813 Beverly Blvd. Montebello, CA
126 – 110 E. Foothill Blvd. Pomona, CA	539 E. Foothill Pomona, CA
133 – 538 W. Adams Blvd. Los Angeles, CA	3775 S. Vermont Los Angeles, CA
	504 S. Figueroa Los Angeles, CA
137 – 8659 Jamacha Rd. Spring Valley, CA	1051 Sweetwater Rd. Spring Valley, CA
141 – 14600 Edwards Ave. Westminister, CA	6982 Westminister Westminister, CA
	15501 Edwards St. Westminister, CA
182 – 2929 N. Blackstone Blvd. Fresno, CA	3703 Blackstone Fresno, CA
184 – 404 S. Saratoga Ave. San Hose, CA	401 Kelly San Jose, CA
188 – 920 Lakeway Dr. Bellingham, WA	125 Samish Way Bellingham, WA
189 – 8530 Evergreen Way Everett, WA	6500 Evergreen Way Everett, WA

USA Station No. and Location	ARCO Station and Location
190 – 19420 44th West Lynnwood, WA	19612 Hwy 99 Lynwood, WA
	4812 196th St. Lynnwood, WA
	3701 196th St. Lynwood, WA
192 – 4505 S. 19th St. Tacoma, WA	6802 6th Ave. Tacoma, WA
	1201 S. Union Tacoma, WA
193 – 7250 Pacific Ave. Tacoma, WA	5232 Pacific Ave. Tacoma, WA
201 – 735 N. Main St. Yreka, CA	120 E. Center Yreka, CA
207 – 2299 Oddie blvd. Sparks, NV	2240 B St. Sparks, NV
	1701 B St. Sparks, NV
208 – 2281 El Camino Ave. Sacramento, CA	2200 El Camino Sacramento, CA
210 – 603 Lincoln Ave. Napa, CA	198 Soscol Ave. Napa, CA
212 – 3880 S. El Camino Real San Mateo, CA	470 Ralston Ave. San Mateo, CA
214 – 19990 Stevens Creek Rd. Cupertino, CA	10550 Deanza Blvd. Cupertino, CA
215 – 1030 E. Alisal St. Salinas, CA	150 Kern St. Salinas, CA

USA Station No. and Location	ARCO Station and Location
216 – 4194 E. Shields Ave. Fresno, CA	4190 Cedar Fresno, CA
	4595 E. Clinton Fresno, CA
	1625 N. Chestnut Fresno, CA
223 – 5040 S. Saviers Rd. Oxnard, CA	4000 S. Saviers Rd. Oxnard, CA
224 – 14900 Burbank Blvd. Van Nuys, CA	555 Van Nuys Blvd. Van Nuys, CA
	14856 Magnolia Van Nuys, CA
	14903 Victory Van Nuys, CA
226 – 2007 N. Durfee Ave. S. El Monte, CA	10904 Rush St. S. El Monte, CA
228 – 11806 S. Valley View Whittier, CA	13444 Telegraph Rd. Whittier, CA
	14400 Telegraph Rd. Whittier, CA
234 – 5122 W. First St. Santa Ana, CA	10721 Westminister Garden Grove, CA
235 – 907 E. 7th Avenue Long Beach, CA	3605 E. 7th St. Long Beach, CA
	3201 E. 7th St. Long Beach, CA
237 – 14595 7th St. Victorville, CA	14485 7th St. Victorville, CA
245 – 411 S. Escondido Blvd. Escondido, CA	300 W. Washington Escondido, CA

USA Station No. and Location	ARCO Station and Location
246 – 7505 Broadway Lemon Grove, CA	6901 Federal Blvd. Lemon Grove, CA
	6098 University Ave. Lemon Grove, CA
	3775 Massachusetts Lemon Grove, CA
	7594 University Ave. Lemon Grove, CA
	8001 Broadway Lemon Grove, CA
252 – 4418 E. Central Ave. Camarillo, CA	650 Arniell Camarillo, CA
253 – 2131 E. Vista Way Vista, CA	745 S. Santa Fe Vista, CA
254 – 921 Black Lake Blvd. Olympia, WA	2400 Harrison Ave NW Olympia, WA
258 – 390 W. Shaw Ave. Clovis, CA	525 E. Shaw Ave. Clovis, CA
	1216 Barstow Ave. Clovis, CA
259 – 901 N. "H" St. Lompoc, CA	538 N. "H" St. Lompoc, CA
256 – 1640 Moorpark Rd. Thousand Oaks, CA	Moorpark Rd. Thousand Oaks, CA
309 – 22727 Bothell Hwy Bothel, WA	Highway 527 Bothel, WA

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

Dated March 31, 1986
[Caption Omitted in Printing]

CONTAINS CONFIDENTIAL MATERIAL FOR COUNSEL'S EYES ONLY NOT TO BE USED, COPIED OR DISCLOSED EXCEPT AS AUTHORIZED BY ORDER OF THIS COURT

Defendant Atlantic Richfield Company ("Atlantic Richfield") submits this Statement Of Uncontroverted Facts And Conclusions Of Law pursuant to Local Rule 7.14.1 in support of its Motion For Partial Summary Judgment.

UNCONTROVERTED FACTS

The Parties

1. Plaintiff USA Petroleum Company ("USA Petroleum") is a limited partnership engaged in the marketing of gasoline and other refined petroleum products in California and elsewhere. USA Petroleum is an independent marketer and markets gasoline under the brand name "USA". (Am. Comp. ¶3.)

2. Defendant Atlantic Richfield is a corporation engaged in, among other things, the refining and marketing of gasoline and other refined products in California and elsewhere. Atlantic Richfield is a major integrated oil company. (Am. Comp. ¶4.) Atlantic Richfield markets

gasoline at the wholesale level to, among others, distributors and dealers which sell it under the brand name "ARCO." (Am. Comp. ¶¶11-12.)

Plaintiff's Sherman Act § 2 Claim

3. Plaintiff charges Atlantic Richfield with violating Sherman Act § 2 by attempting to monopolize "the distribution and sale of gasoline in and to the gasoline discount market in California and the western United States." (Am. Comp. ¶46.) Plaintiff alleges that there is a "dangerous probability" that Atlantic Richfield will succeed in its attempt to monopolize this "gasoline discount market." (Am. Comp. ¶47.)

4. Gasoline retailers sell gasoline to consumers under "major-brands" or "minor-brands." Plaintiff contends that the "gasoline discount market" consists of sellers identified by the Lundberg Survey, Inc. as "minors" or "non-majors" plus, beginning April 1982, ARCO-brand sellers, which then allegedly entered the discount market in competition with these "minors" or "non-majors." (Plaintiff's Supplemental Response to Interrogatory 3.)

5. As set out more fully below, no such "gasoline discount market" exists as a separate and distinct market removed from the competition of the major-brand sellers. All gasoline retailers, whether major-brand or minor-brand, are in competition with one another in the same market.

Major- and Minor-Brand Gasoline Is Interchangeable

6. Consumers can use major-brand and minor-brand gasoline reasonably interchangeably for the same purposes. While gasoline of different brands may vary slightly, generally applicable government and industry specifications essentially standardize the chemical characteristics affecting gasoline quality. (Reilly Dec. ¶¶5-7; Turner Dec. ¶¶5-11.)

7. Major and independent refiners and marketers freely buy, sell and exchange gasoline among each other. (Reilly Dec. ¶7; Turner Dec. ¶¶12-18; Am. Comp. ¶11.)

Correlation of Major- and Minor-Brand Prices

8. The prices of major-brand and minor-brand gasoline exhibit patterns of closely parallel movement, as described more fully below. These highly correlated prices show that buyers and sellers of gasoline consider that major-brand and minor-brand gasoline sales occur in a single market.

9. The correlations of Lundberg price data for the Los Angeles area from the period September 24, 1982 to March 31, 1984 establish that the prices and price changes of major-brand and minor-brand gasoline were highly correlated during the period at issue in this lawsuit.

a. The high correlation between major-brand and minor-brand prices is shown by the average correlation coefficient of .936 for correlations between the absolute levels of these prices. (Johnston Dec. ¶28 and Table 1, Part A; *see* Stigler Dec. ¶33.)

b. The high correlation between major-brand and minor-brand prices is also shown by the average

correlation coefficients for correlations between major-brand and minor-brand price changes, which ranged from .940 (for one period price differences) to .977 (for four period price differences). (Johnston Dec. ¶29 and Table 1, Part A.)

c. The significance of these high correlations in establishing that major-brand and minor-brand sales are in one market is confirmed by the benchmark averages of coefficients within the major-brand price series and within the minor-brand price series, which differed only triflingly from the averages of coefficients between major-brand and minor-brand prices. (Johnston Dec. ¶¶26-29; Table 1, Part A; Stigler Dec. ¶34.)

d. The additional sets of calculations which tested for the effects of crude oil price changes, inflation and serial correlation provide assurance that the high results were not the product of some factor other than the actual relationship between the prices correlated. (Johnston Dec. ¶¶30-38 and Table 1, Part B; Stigler Dec. ¶¶36-37.)

Other Indicia of Competition

10. Participants in the oil industry recognize in economically significant respects that the major-brand and minor-brand retailers compete with each other in the same market. Both Atlantic Richfield and USA Petroleum regularly surveyed the prices at major-brand and minor-brand stations for the purpose of determining their gasoline prices. (Paula Johnston Dec. ¶¶3-5, 8-9 and Ex. A; Reilly Dec. ¶¶8, 10-12 and Exs. A, B.) The Lundberg market share reports show the respective market shares of major and minor brands only as a percentage of the retail market as a whole and not of the separate markets for which plaintiff contends. (Atlantic Richfield App. E.)

11. The allegedly unique characteristics of minor-brand sellers that plaintiff argues justify placing them in a separate market, in fact, are not unique to such sellers. Lundberg data show a substantial overlap between the prices charged by these "discount" sellers and the prices charged at major-brand stations. (Nelson Dec. ¶¶2-5 and Tables 1-3.) The other marketing practices cited as characteristic of the "discount" market--cash-only sales and self-service vendors--are also widely used by major-brand retailers. (Nelson Dec. ¶¶6-7 and Tables 4-6.)

Insufficiency of Atlantic Richfield's Market Share

12. Atlantic Richfield's share of the retail gasoline market in California and Washington, the states in which USA Petroleum contends it has been injured by Atlantic Richfield's conduct, has not exceeded 17 percent during the period at issue in this lawsuit. (Reilly Dec. ¶13.) This market share, particularly in light of the competition of the other major oil companies in the relevant market, is clearly insufficient to present a danger of monopolization.

Potential Entry by Other Majors into the Alleged "Discount" Market

13. A fundamental premise of USA Petroleum's case is that in April 1982 Atlantic Richfield entered the alleged "discount" market, previously occupied only by independent retailers, by adopting a no-credit, low-price marketing strategy. (Am. Comp. ¶19.) Assuming *arguendo* the existence of a separate "discount" market, Atlantic Richfield's ability to enter this market by adopting such a

strategy implies the ability of the other major oil companies to do likewise. Plaintiff has not identified any barrier to such entry by a major oil company. Thus, each of the other major oil companies must be considered a potential entrant into the alleged "discount" market.

14. The possibility of entry by the other major oil companies into the alleged "discount" market would effectively preclude Atlantic Richfield from exercising monopoly power even if Atlantic Richfield achieved a dominant share of that market.

Plaintiff's Sherman Act § 1 Claim

15. Plaintiff claims damages in its capacity as a competitor of ARCO-brand retailers from alleged vertical conspiracies between Atlantic Richfield and ARCO-branded distributors and dealers to set retail prices at "artificially low and uncompetitive levels." (Am. Comp. ¶¶40-41.)

CONCLUSIONS OF LAW

1. No genuine issue of material fact exists with respect to defendant Atlantic Richfield's motion for partial summary judgment, and it is therefore appropriate for disposition pursuant to Fed. R. Civ. P. 56.

Plaintiff's Sherman Act § 2 Claim

2. Sherman Act § 2 requires as an essential element of a claim of attempted monopolization proof that there is a dangerous probability that the defendant will achieve a

monopoly of a properly defined market. *E.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984) *cert. denied*, 105 S. Ct. 1184 (1985); *Foremost Pro Color, v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983) *cert. denied*, 465 U.S. 1038 (1984). *See United States v. Grinnel Corp.*, 384 U.S. 563, 570-73 (1966).

3. A relevant product market for antitrust purposes must include all commodities that are reasonably interchangeable either in use by consumers or in production by manufacturers. *E.g., United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-96 (1956); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975). Among the "practical indicia" that may be used in market determination are "peculiar characteristics and uses" of the commodities, requirements for "unique production facilities," and "distinct customers, distinct prices," and "sensitivity to price changes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

4. The tendency of the prices of two commodities to "move together in response to the same stimuli" indicates that the commodities occupy the same market. *United States v. Consolidated Foods Corp.*, 455 F. Supp. 108, 125, 128 n.7 (E.D. Pa. 1978). *See, e.g., United States v. Aluminum Co. of America*, 377 U.S. 271, 276 (1964); *United States v. Kennecott Copper Corp.*, 231 F. Supp. 95, 100-101 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 391 (S.D. N.Y.1957), *aff'd*, 259 F.2d 524 (2nd Cir. 1958).

5. The industry's division of sellers into discrete groupings or classes, or industry recognition of the distinct characteristics of different types of sellers, is relevant to market definition only where "economically significant from the viewpoint of competition." *ITT Corp. v. GTE Corp.*, 518 F.2d 913, 932-33 (9th Cir. 1975). For example, the classification of sellers as "premium," "discount" or other price/quality descriptions lacks the independent economic significance required for use in defining markets. *E.g., Brown Shoe, supra*, 370 U.S. at 326; *Carter Hawley Hale Stores, Inc. v. Limited, Inc.*, 587 F. Supp. 246 (C.D. Cal. 1984); *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966).

6. All brands of gasoline compete in a single market. Thus, the relevant product market in this action, in which the likelihood of Atlantic Richfield achieving a monopoly must be evaluated, is the retail gasoline market in its entirety, including both major-brand and minor-brand retailers. Plaintiff's alleged "discount" gasoline market does not satisfy the requirements of a distinct market or submarket for antitrust purposes. *See, e.g., Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974); *see United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1262 (C.D. Cal. 1973), *aff'd mem. sub nom. Tidewater Oil Co. v. United States*, 418 U.S. 906 (1974).

7. A firm that controls only twenty percent or less of the relevant market, and that must compete against other large competitors with a substantial share of the

market, as a matter of law presents no dangerous probability of successful monopolization. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983); *Robinson v. Magovern*, 521 F. Supp. 842, 891 (W.D. Pa. 1981); *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. 649, 668 (S.D.N.Y. 1980), *aff'd*, 697 F.2d 495 (2nd Cir. 1983).

8. There is, as a matter of law, no dangerous probability of monopolization of a market for which there are no barriers to entry by a substantial group of significant potential competitors. *E.g., General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 974 n.2 (9th Cir. 1983); *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982). The majors other than Atlantic Richfield are such potential new competitors in the "discount" gasoline market, assuming *arguendo* that such a market exists.

9. The Ninth Circuit's *Lessig* line of cases permits a plaintiff to satisfy only its initial burden of coming forward with direct evidence of the dangerous probability element of attempted monopolization by proof of *per se* or predatory conduct. The defendant rebuts the *Lessig* inference by introducing evidence negating the likelihood of monopolization and thereby eliminates the inference as a basis to establish a genuine issue for trial. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029-30 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 854 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *USA Petroleum Co., supra*, 577 F. Supp. at 1304; *see* Fed. R. Evid. 301.

10. Plaintiff USA Petroleum's claims under Sherman Act section 2 must be dismissed because there is no genuine issue of material fact disputing defendant's factual showing that there is no dangerous probability of monopolization and because that showing rebuts any *Lessig* inference of dangerous probability that may arise from the alleged *per se* or predatory conduct.

Plaintiff's Sherman Act § 1 Claim

11. A plaintiff seeking damages under Section 4 of the Clayton Act must establish "antitrust injury" "of the type that the antitrust laws were intended to prevent and that flows from that which make the defendant's acts unlawful." "Antitrust injury" must reflect the anticompetitive effect of the violation or anticompetitive acts made possible by the violation. *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 489 (1977).

12. A plaintiff suffers "antitrust injury," as defined in paragraph 11 above, as a result of the prices of its competitor depressed by vertical conspiracy only if the lower prices are "predatory." *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). *Accord, Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708 (7th Cir.), *cert. denied*, 105 S. Ct. 432 (1984).

13. Only a monopolist or one who poses a dangerous probability of monopolization, as a matter of law, can engage in "predatory pricing" as that term is used in paragraph 12 above.

14. Even assuming that plaintiff could establish that the alleged vertical conspiracies damaged it, plaintiff can-

not establish "antitrust injury" because it cannot demonstrate a dangerous probability of monopoly. *See* ¶¶7-10 above. *Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.)*, 760 F.2d 1013, 1018 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985).

Dated: March 31, 1986.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STIPULATION AND ORDER DISMISSING COUNT TWO OF FIRST AMENDED COMPLAINT AND DEFERRING FURTHER BRIEFING AND HEARING OF SUMMARY JUDGMENT MOTION

Dated April 28, 1986
[Caption Omitted in Printing]

WHEREAS defendant Atlantic Richfield Company ("Atlantic Richfield") has filed a motion for partial summary judgment, dated March 31, 1986, which seeks the dismissal of Counts One and Two of the First Amended Complaint (the "Amended Complaint"), containing respectively the Sherman Act § 1 and § 2 claims asserted in this action,

WHEREAS plaintiff USA now wishes to dismiss with prejudice its attempt to monopolize claims and to defer further briefing and argument on Atlantic Richfield's motion for partial summary judgment as it relates to Count One,

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys, that:

1. Count Two of USA's Amended Complaint (and any other Count to the extent based upon a claimed attempt to monopolize but not to any other extent) is hereby dismissed with prejudice and without costs to either party.

2. USA shall have to and including June 16, 1986 to serve its opposition to Atlantic Richfield's summary judgment motion addressed to Count One of the Amended Complaint and Atlantic Richfield shall have to and including July 16, 1986 to serve its reply.

3. The argument on the motion, presently set for April 28, 1986, is continued until a date to be determined after USA files its opposition.

Dated: April 23, 1986.

Respectfully submitted,

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Dated: April 24, 1986.

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ORDER

IT IS SO ORDERED.

Dated: April 28, 1986.

/s/ William P. Gray
William P. Gray
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STATEMENT OF UNCONTROVERTED
FACTS AND CONCLUSIONS OF LAW

Dated June 9, 1986
[Caption Omitted in Printing]

Defendant Atlantic Richfield Company ("Atlantic Richfield") submits this Statement Of Uncontroverted Facts and Conclusions Of Law pursuant to Local Rules 7.14.1 and 7.14.4 in support of its Motion For A Pretrial Order (1) Defining The Relevant Product Market And (2) Determining The Legal Sufficiency Of Plaintiff's Sherman Act § 1 Case And Proposed Proof Of Vertical Conspiracy.

UNCONTROVERTED FACTS

Atlantic Richfield adopts as its Statement Of Uncontroverted Facts the facts stated in paragraphs 2 through 4 of the proposed pretrial order submitted with this motion and in paragraphs 1-4, and 15 at pp. 1-2 and 5-6 of the Statement Of Uncontroverted Facts And Conclusions Of Law In Support Of Partial Summary Judgment previously submitted with its March 31, 1986 motion for partial summary judgment ("March 31, 1986 Local Rule 7 Statement").

CONCLUSIONS OF LAW

Atlantic Richfield also adopts by reference the conclusions of law stated in paragraphs 1, 3-8, 11-14 at pp. 7-11 of its March 31, 1986 Local Rule 7 Statement. Atlantic

Richfield submits the following additional conclusions of law.*

1. In a private antitrust action by a plaintiff seeking damages from the alleged vertical price-fixing of its competitors, prices, proof of the relevant market and the likelihood of monopolization is relevant to determining (a) whether the plaintiff can satisfy the "antitrust injury" requirement of Clayton Act section 4 and (b) whether a plausible motive for the alleged conspiracy exists. Cases cited in March 31, 1986 Local Rule 7 Statement, Conclusions of Law 11-14; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. ___, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

2. Proof of the relevant market is also relevant to a claim of Robinson-Patman Act primary line price discrimination requiring proof of an injury to competition. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

3. An antitrust plaintiff may recover damages only for injuries that it proves were caused by the unlawful acts of the defendant and not by some other factor including lawful competition by the defendant. *E.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1161-64 (7th Cir. 1983); *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954, 964 (M.D. Pa. 1981); *ILC Peripherals Leasing Corp. v. I.M.B. Corp.*, 458 F. Supp. 423, 435 (N.D. Cal. 1978), *aff'd mem., Memorex Corp. v. I.B.M. Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

*Although the Local Rules do not require conclusions of law for the Rule 16 issue formulation portion of this motion, Atlantic Richfield submits Conclusions of Law 3-9 below for the assistance of the Court.

4. It is the burden of the plaintiff to segregate its injuries between those caused by lawful, and by unlawful, competition as part of showing the fact of (and not the amount of) its damages. *E.g., MCI Communications Corp., supra*, 708 F.2d at 1161; *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1261-63 (9th Cir. 1981); *R.S.E., Inc., supra*, 523 F. Supp. 965.

5. A private plaintiff seeking to recover damages from alleged vertical price fixing conspiracies between a manufacturer and its independent dealers and distributors must establish the participation in vertical conspiracy of each dealer or distributor that allegedly caused it damages. *E.g., Link v. Mercedes-Benz of North America, Inc.*, 1984-1 Trade Cas. ¶ 66,056 (E.D. Pa.), *aff'd*, ___F.2d___ (3d Cir. 1986).

6. Prices arrived at by a dealer or distributor in his own best interest, even when preceded by discussions in which his supplier seeks to persuade him to adopt that price, do not amount to vertical price-fixing. *E.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960); *General Cinema Corp. v. Buena Vista Distributing Co.*, 681 F.2d 594, 597 (9th Cir. 1982); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1357 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972).

7. Proof of vertical price-fixing requires a showing (a) of coercion – affirmative acts by the supplier going beyond the mere granting and withdrawal of wholesale

price discounts and beyond suggestion, exposition and Persuasion – and (b) of succumbing – that the dealer was deprived of his free choice by that coercion. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 691 F.2d 1335, 1343 (9th Cir. 1982), *cert. denied,* 464 U.S. 1068 (1984) ("MDL-150"); *Hanson, supra,* 541 F.2d at 1357 n.3.

8. Proof of a close conformity of retail and wholesale prices or of the granting and withdrawal of wholesale price discounts is not evidence that independent dealers or distributors participated in vertical conspiracies with their supplier. *MDL-150, supra,* 691 F.2d at 1343; *Hanson, supra,* 541 F.2d at 1357; *Gray, supra,* 469 F.2d at 747-48; *MDL 150,* 523 F.Supp. at 1119.

9. Proof of vertical conspiracy through showing the supplier's acts of coercion and the resulting succumbing by the coerced dealer inherently must be made on a dealer-by-dealer basis. E.g., *MDL-150, supra,* 523 F.2d at 1120; *see Chicken Delight, Inc. v. Harris,* 412 F.2d 830, 831 (9th Cir. 1969).

Dated: June 9, 1986.

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[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DECLARATION OF MAXWELL M. BLECHER

Dated July 24, 1986

I, MAXWELL M. BLECHER, declare:

1. I am a member of the law firm of Blecher & Collins, attorneys of record for plaintiff USA Petroleum Company ("USA") in this litigation. I am licensed to practice in California and before this Court. I submit this declaration pursuant to Fed. R. Civ. P. 56(f) in opposition to defendant Atlantic Richfield Company's ("ARCO") Motion For A Pretrial Order, *et seq*.

2. To date, discovery in this litigation has focused on document productions by both USA and ARCO. Pursuant to stipulation, the parties have postponed deposition discovery until after document production by both parties has been completed.

3. As we have demonstrated in our memorandum of points and authorities, relevant market and monopoly power are irrelevant to proof a § 1 *per se* violation such as resale price maintenance. Should the Court, however unlikely, find that they are somehow relevant to USA's § 1 claim, USA will require additional discovery on these issues. That discovery includes, at the very least, deposition discovery of both major and independent marketers of gasoline to ascertain the marketing practices of each type of gasoline vendor both before and after ARCO's alleged vertical price-fixing conspiracy began.

4. I am informed and believe that deposition discovery will produce evidence that prior to the alleged

EXHIBIT A

vertical conspiracy, major oil companies and independents offered distinct services to distinct classes of customers. These differences in marketing practices include credit versus cash-only sales, full service versus self service stations, and full versus discount prices.

5. I also believe that deposition discovery will reveal the impact of ARCO's alleged vertical conspiracy in the marketplace.

6. I believe that ARCO's motion for a pretrial order dismissing USA's § 1 claim is not timely or ripe for adjudication in light of the early stage of discovery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 24, 1986, at Los Angeles, California.

/s/ Maxwell M. Blecher
MAXWELL M. BLECHER

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO DEFENDANT'S MOTION FOR A PRETRIAL ORDER (1) DEFINING THE RELEVANT PRODUCT MARKET AND (2) DETERMINING THE LEGAL SUFFICIENCY OF PLAINTIFF'S SHERMAN ACT § 1 CASE AND PROPOSED PROOF OF VERTICAL CONSPIRACY

Dated July 25, 1986
[Caption Omitted in Printing]

Plaintiff USA Petroleum Company ("USA") submits the following genuine issues of fact and law pursuant to Local Rule 7.14.2 in support of its Opposition to Defendant's Motion For A Pretrial Order (1) Defining The Relevant Product Market And (2) Determining The Legal Sufficiency of Plaintiff's Sherman Act § 1 Case and Proposed Proof of Vertical Conspiracy.

GENUINE ISSUES OF FACT

1. Whether ARCO has engaged in a vertical price-fixing conspiracy with ARCO-branded distributors and ARCO-branded dealers to fix prices at artificially low levels?

2. Whether ARCO's vertical price-fixing conspiracy has caused USA injury and in what amount?

3. Pursuant to the Stipulation and Order Dismissing Count Two of First Amended Complaint and Deferring Further Briefing and Hearing of Summary Judgment

Motion, filed April 28, 1986, plaintiff dismissed with prejudice its attempted monopolization claim under § 2.

Dated: July 25, 1986.

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MAXWELL M. BLECHER
ALICIA G. ROSENBERG

By /s/ Alicia G. Rosenberg
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Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

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(5)

No. 88-1668

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

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August 1989

55PP

QUESTION PRESENTED

Whether a competitor's profits and sales lost as a result of nonpredatory prices imposed by a manufacturer on its retailers through vertical maximum price fixing amount to antitrust injury necessary for the competitor to bring a private antitrust action.

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OTHER AUTHORITIES

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No. 88-1668

In The

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Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY[1]

[1] The statement of Petitioner's Non-Wholly Owned Subsidiaries and Affiliates appears as Appendix D to the Petition for Certiorari. There have been no changes in the interim. This Brief uses "JA" to refer to pages of the Joint Appendix and "Dckt. NR" to refer to Docket Numbers on the list of Relevant Docket Entries (JA 1-9) for items not included in the Joint Appendix.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 687 and appears as Appendix A to the Petition for Certiorari ("Pet. App. A"). The District Court's unreported ruling granting summary judgment dismissing plaintiff's Sherman Act § 1 claim appears as Appendix B to the Petition for Certiorari ("Pet. App. B").

JURISDICTION

The Court of Appeals entered its judgment in this case on October 7, 1988. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on January 10, 1989. (Pet. App. C.) A timely petition for writ of certiorari was filed on April 7, 1989. On June 5, 1989 this Court granted the petition. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

STATEMENT OF THE CASE

Atlantic Richfield Company ("ARCO") is an integrated oil company that, among other things, refines and markets gasoline throughout the western United States. ARCO markets gasoline to consumers directly through its own gasoline stations and indirectly through independent ARCO-branded distributors and dealers.

USA Petroleum Company ("USA") purchases gasoline from refiners for sale at its USA-brand stations. Some of these USA-brand stations compete with ARCO-brand stations in the market for sales of gasoline to consumers.

ARCO's Low-Price Marketing Program

In April 1982, ARCO embarked upon a highly successful marketing program. ARCO sought to appeal to consumers of gasoline, who had become more price conscious after the dramatic price increases of the 1970's, by becoming a low-price marketer. ARCO discontinued its credit card and otherwise lowered its costs of refining and selling gasoline. Those cost-cutting measures enabled ARCO to lower the wholesale prices charged to independently owned ARCO-branded distributors and dealers as well as to its company-operated stations. ARCO encouraged its customers to pass those decreases along to consumers in the form of lower retail prices.

As a result of its marketing program, the ARCO-brand share of the retail gasoline market in California and Washington increased from the 10% to 12% level in 1981 to approximately 14% to 16% in 1983. (Declaration of Edward G. Reilly, Dckt. NR 80, p. 193.) As the District Court found, the ARCO-brand share of that market never exceeded 17% during any relevant period. (Pet. App. B, ¶ 3.) As the District Court also found, this market share is clearly insufficient for ARCO to exercise any market power over retail gasoline prices. (*Id.*, ¶¶ 3, 4.)

USA's Lawsuit

In May 1983, USA commenced this lawsuit challenging ARCO's marketing program. USA alleged that the lower prices at competing ARCO-branded stations caused USA stations either to reduce prices or to lose sales.[2] It sought both injunctive relief and treble damages measured by the sales and profits allegedly lost at USA stations as a result of competition from the low retail prices at the competing ARCO-branded stations. USA sued only ARCO, and not any ARCO-branded distributors or dealers.

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[2] In interrogatory responses, USA identified 66 separate USA stations in the states of California, Washington and Nevada that it contended were most directly and severely injured by the low ARCO prices. It also identified for each of those stations the ARCO station or stations that caused the injury. Of the 102 ARCO stations identified, nine were owned and operated by ARCO throughout the relevant time period. The other 93 were operated by independent ARCO distributors or dealers. (JA 55-64.)

USA's complaint asserted a host of federal and state law claims. Its essence, however, was a claim that ARCO had attempted to monopolize the retail gasoline market by engaging in predatory pricing, in violation of Sherman Act § 2. The complaint also alleged that ARCO had engaged in vertical maximum price fixing with its distributors and dealers in violation of Sherman Act § 1.

The District Court dismissed the original Sherman Act § 2 claim because the complaint alleged facts showing that ARCO could not successfully monopolize the market. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983). USA amended its complaint to allege that ARCO was attempting to monopolize the "discount segment of the gasoline market," which it asserted constituted a separate and distinct market for antitrust purposes. (*See* JA 10-35.) The District Court, while highly skeptical that the claim could succeed when put to a factual test, felt compelled not to dismiss the amended Sherman Act § 2 claim at the pleading stage. (Dckt. NR 54.) Accordingly, the attempted monopolization case proceeded, putting ARCO to the burden of exhaustive document discovery.[3]

ARCO's Summary Judgment

At the conclusion of document discovery, ARCO moved for summary judgment dismissing the Sherman

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[3] ARCO devoted approximately 34,000 hours of paralegal, searcher and clerical hours to review millions of pages of documents and produced more than 130,000 pages of documents to USA. (*See* Joint Status Report, Dckt. NR 93, ¶ B.1.)

Act §§ 1 and 2 claims. The motion was based upon an extensive factual record showing that ARCO and the other sellers of ARCO-brand gasoline, individually or collectively, posed no real threat of acquiring monopoly power in any relevant market. The motion demonstrated that there was only a single retail gasoline market, which contained too many competitors, and of which ARCO gasoline had far too small a share, for ARCO (and its dealers) ever to obtain the power to charge supracompetitive prices.[4]

Confronted by ARCO's motion, USA promptly stipulated to dismiss with prejudice its Sherman Act § 2 claim. (JA 76.) USA admitted that ARCO posed no threat of acquiring monopoly power in the retail gasoline market.[5]

[4] *See* Dckt. NR 79, 80. The legal theory for dismissal of the Sherman Act § 2 claim was that this lack of market power, actual or threatened, precluded USA from establishing one of the substantive elements of such a claim – dangerous probability of monopolization. The legal theory for dismissal of the Sherman Act § 1 claim was that the same lack of current or threatened market power precluded USA, even assuming arguendo that it could prove price fixing, from proving that the challenged ARCO-brand prices were predatory. Accordingly, USA could not satisfy the antitrust-injury requirement imposed by Clayton Act § 4 as a condition for a private action based upon the Sherman Act.

[5] *See, e.g.*, 10/14/86 Transcript of Hearing on ARCO's Summary Judgment Motion, at p. 19, lines 7-10 (USA's counsel, Mr. Blecher, stated "I believe there is no dangerous probability of monopolization and therefore the idea that this price is predatory . . . even by the most liberal standard, is probably going to fail"); USA's Opening Brief in Ninth Circuit, at p. 6 ("Plaintiff, already having abandoned its Section 2 Sherman Act claims, offered no proof on predatory pricing or dangerous probability of monopolization").

USA, however, asserted that its § 1 claim permitted it to recover all the damages sought by its § 2 claim, but without the need to make any showing that its injuries as a competitor reflected or flowed from injury to competition in a relevant market.

The District Court granted ARCO summary judgment dismissing the § 1 claim. (Pet. App. B.) In granting summary judgment, the District Court assumed that USA could prove that ARCO violated Sherman Act § 1 and that USA had lost profits and sales as a result of having had to compete against the lower fixed prices at ARCO-branded stations.[6] The District Court held that USA could not establish that the challenged prices were predatory and therefore could not establish antitrust injury.[7] The

[6] The District Court thus assumed the existence of the only two facts as to which USA asserted there was a genuine issue on ARCO's motion. (JA 86-87.)

[7] "Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the antitrust injury requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned, as indicated in paragraphs 2 to 4 hereof, no such showing; [*i.e.*, that the challenged ARCO prices were predatory] can be made." (Pet. App. B, ¶ 5.) Paragraphs 3 and 4 of the District Court's order found the following as existing without substantial controversy:

> "3. The combined share of the relevant market held by Atlantic Richfield and other ARCO-brand gasoline sellers is clearly insufficient to present a dangerous probability of monopolization, particularly in light of the com-

(Continued on following page)

District Court directed the entry of judgment on the Sherman Act § 1 claim pursuant to Fed. R. Civ. P. 54(b) so that USA Petroleum could appeal this determinative issue of law.

The Ninth Circuit Decision

A panel of the Ninth Circuit, dividing two to one, reversed the District Court's summary judgment and remanded the § 1 claim for trial.

The majority opinion stated that the antitrust-injury issue was a "difficult question" and one of "first impression" within the Ninth Circuit. 859 F.2d at 689. It also recognized that the Seventh Circuit previously had decided the very same issue in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) ("*Jack Walters*"). However, the majority refused to follow the Seventh Circuit rule that a plaintiff suffers antitrust injury only when its competitor's prices set by vertical maximum price fixing are predatory. Instead, it in essence held that a competitor establishes antitrust injury simply by showing that its injuries were caused in fact by the lower prices resulting from vertical maximum price fixing because such price fixing is *per se* illegal. 859 F.2d at 697.

The dissent disagreed. It read this Court's controlling case law on "antitrust injury" to require an antitrust plaintiff to establish more than cause-in-fact injury. Specifically, the dissent would require the plaintiff to establish that its "alleged injury results from the *anticompetitive* aspects of" the violation – even where the violation is *per se* illegal. 859 F.2d at 701 (Alarcon, J., dissenting). And, the dissent found that USA could not establish antitrust injury here because of the unchallenged District Court finding that the fixed prices were not predatory. *See* 859 F.2d at 703-705.

ARCO filed a motion for rehearing and suggestion that the rehearing be *en banc* because of the conceded conflict with the Seventh Circuit. The Seventh Circuit then, in a unanimous opinion by the Chief Judge, reaffirmed its antitrust-injury rule limiting competitor suits challenging vertical maximum price fixing to predatory prices. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) ("*Indiana Grocery*"). That opinion stated that the Ninth Circuit decision, by reducing the antitrust-injury requirement to a mere cause-in-fact test for *per se* violations of the Sherman Act, stood "the antitrust injury inquiry on its head." 864 F.2d at 1419 n.6. Despite the Seventh Circuit decision, the Ninth Circuit panel denied ARCO's motion for a rehearing. (Pet. App. C.)

(Continued from previous page)

petition of other major oil companies. The ARCO-brand share of the retail gasoline market in California and Washington, the states in which USA contends it has been injured, has not exceeded 17 percent during the relevant period.

4. Even assuming *arguendo* that there exists a separate 'discount' gasoline market, other major oil companies may enter this market, as USA contends that Atlantic Richfield did in April 1982, and the possibility of such entry effectively prevents Atlantic Richfield and other sellers of ARCO-brand gasoline from exercising monopoly power in that market regardless of their market share."

USA did not challenge these findings on appeal.

SUMMARY OF ARGUMENT

This Court's antitrust-injury requirement demands a careful analysis of the relationship between the specific injury claimed by a plaintiff and the reasons why the courts have made the conduct causing that injury unlawful. Such an analysis is necessary, because the purpose of the requirement is to link together the provisions of the antitrust laws providing for private recovery (Clayton Act §§ 4 and 16) with those defining substantive violations (including Sherman Act § 1).

A private plaintiff can seek redress only for a loss "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("*Brunswick*"); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) ("*Cargill*"). A plaintiff cannot recover for "losses which are of no concern to the antitrust laws." 429 U.S. at 487. A plaintiff also cannot recover for losses that reflect increased competition because such a recovery would be "inimical to the purposes of" the antitrust laws. 429 U.S. at 488.

The Ninth Circuit's opinion substitutes for the analysis mandated by this Court's opinions a formalistic incantation of labels. The result is a rule permitting a competitor who proves vertical maximum price fixing to recover for losses attributable to the increased competition from the lower fixed prices. This rule divorces, rather than links together, antitrust remedies and antitrust policy. Such losses of a competitor do not reflect the anticompetitive effects that make vertical maximum price fixing

illegal. Moreover, a competitor's losses from nonpredatory prices reflect increased interbrand competition, which is the primary concern of the antitrust laws.

To be sure, the Ninth Circuit opinion asserts that its rule comports with the limitations set out in this Court's antitrust-injury opinions. But the Ninth Circuit opinion misstates both the standard for determining antitrust injury and the elements involved in that determination. The Ninth Circuit states that the test for antitrust injury is "whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused by the defendant's antitrust violation." 859 F.2d at 693. This statement of the test erroneously focuses on the market generally rather than on the specific plaintiff's injury and does not require a correlation between the plaintiff's injury and the reasons why the defendant's conduct is illegal. Having misstated the test, the Ninth Circuit then relies upon two mistaken presumptions to conclude erroneously that a competitor's injury from nonpredatory vertical maximum price fixing is antitrust injury.

The proper analysis, required by this Court's opinions but eschewed by the Ninth Circuit, demonstrates that there is no relationship between a competitor's losses and the policies and effects that make vertical maximum price fixing *per se* illegal. Those losses therefore do not satisfy the antitrust-injury requirement.

A correct analysis also shows that USA's losses here resulted from increased competition. The primary concern of antitrust law is interbrand competition, because it leads to lower prices and increased output for consumers. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485

U.S. ___, 108 S. Ct. 1515, 1521 (1988) ("*Sharp*"). The lower ARCO prices challenged here unquestionably increased competition between ARCO and the other brands of gasoline, including USA. Indeed, that is the reason for USA's lawsuit.

Moreover, the lower ARCO prices assumed in this case to result from vertical maximum price fixing cannot injure consumer welfare. The District Court's unchallenged findings that these prices present no danger of creating a market structure that will permit supracompetitive prices in the future establish that they represent an immediate gain which will not later be offset by any corresponding injury to consumers. Such prices cannot inflict antitrust injury.

ARGUMENT

I. THE NINTH CIRCUIT RULE PERMITTING RECOVERY FOR A COMPETITOR'S LOSSES FROM NONPREDATORY VERTICAL MAXIMUM PRICE FIXING FAILS TO GIVE EFFECT TO THIS COURT'S ANTITRUST INJURY REQUIREMENT

A. A Plaintiff Suffers Antitrust Injury Only Where Its Losses Reflect The Anticompetitive Effects That Make The Defendant's Conduct Unlawful

In *Brunswick*, 429 U.S. at 489, this Court held that a plaintiff under Clayton Act § 4 must:

> "prove *antitrust* injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts

> unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

The plaintiffs in *Brunswick* had won a jury verdict of $2,358,000 (before trebling), representing profits they would have earned if competing bowling alleys acquired by defendant through acquisitions assumed to violate Clayton Act § 7 had instead been allowed to go out of business, as would have occurred but for the illegal merger. The Court held that the mere showing that plaintiffs' injury had been caused in fact by an antitrust violation did not satisfy Clayton Act § 4. *Id.*

The Court held that the plaintiffs also had to show that their injury reflected the "reason the merger was condemned" under the antitrust laws. 429 U.S. at 487. The merger was assumed for purposes of the appeal to be illegal because it created a deep pocket competitor that could have engaged in predatory conduct. *Id.* The plaintiffs' losses, however, resulted simply from continued competition from these centers that otherwise would have gone out of business, and not from any predatory conduct. The Court refused to allow an antitrust recovery where there was no clear linkage between the plaintiffs' injury and the anticompetitive effects that were assumed to make the merger unlawful.

The Court's opinion offered several different formulations of the reasons for imposing such a limitation on private antitrust recovery. It described the lower courts' award of damages as "divorc[ing] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so. . . ." 429 U.S. at 487. It further

described the award of such damages as incorrectly allowing recovery for all dislocations caused by an antitrust violation "regardless of whether those dislocations have anything to do with the reason the [conduct illegal under the antitrust laws] was condemned," and stated that such a result "would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws." *Id.* The Court further noted that the plaintiffs' injury bore "no relationship to" the anticompetitive effects which made the challenged merger illegal, because plaintiffs "would have suffered the identical 'loss' – but no compensable injury" had the proscribed effects not been present. *Id.*

By relating the private remedies for an antitrust violation to the reasons for substantive illegality, the Court announced a limitation akin to the common law rule barring recovery for injuries different from those which a statute was designed to prevent.[8] *See Jack Walters*, 737 F.2d at 708-09 (*Brunswick* represents "the application to antitrust law" of this tort doctrine). The Court's limitation of the losses for which antitrust recovery is available, like the analogous common-law limitations, serves to keep

[8] In one of the early cases in which this doctrine was established, *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874), the court held that a shipper could not recover damages for sheep lost overboard while in the care of the defendant shipowner despite the defendant's violation of an Act of Parliament requiring that animals being shipped be held in pens. The court did so because the Act had been passed to keep the animals from contaminating each other, not to keep them from being swept overboard. While the lack of pens was a "but for" cause of the loss of the sheep, that loss did not reflect the policies underlying the Act and thus was not compensable.

the size of damage awards related to the basis of the defendant's substantive liability. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1461 (1985).

The *Brunswick* Court also articulated as a reason for its decision that it would be "inimical to the purposes of" the antitrust laws to award damages for the losses claimed in that case. 429 U.S. at 488. The Court noted that "the antitrust laws [were] not merely indifferent to the injury claimed. . . ." *Id.* The plaintiffs claimed profits lost as a result of increased competition. The fact that the increased competition had been enabled by an antitrust violation was not relevant to the antitrust-injury issue because a competitor's lost profits were not the concern of the antitrust laws. Those laws "were enacted for 'the protection of *competition*, not *competitors*.'" *Id.* (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Subsequent opinions of the Court have reaffirmed the antitrust-injury requirement, its common-law roots and its antitrust-policy rationales. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 & n.13 (1982), the Court, in the context of a Sherman Act § 1 case, reaffirmed the historical and current bases of the limitations on private antitrust recovery. The Court expressed the historical basis by describing the analysis under Clayton Act § 4 as similar to "that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'" 457 U.S. at 477. It expressed the current basis by noting that the "potency of the [treble damages] remedy implies the need for some care in its application." *Id.* The *McCready* Court found antitrust injury only because the

plaintiff's injury, which was directly caused by the defendants' conspiracy, was "inextricably intertwined" with the very injury to competition that made the conspiracy unlawful. 457 U.S. at 484 & n.21.

The Court in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 531-32, 533 & n.28, 535-36 (1983), even more clearly stated the common-law origins of the various limitations on antitrust recovery: "Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." 459 U.S. at 533. Specifically, the Court described the antitrust-injury limitation as requiring a decision whether the plaintiff was "part of the class the Sherman Act was designed to protect" and stated that this decision required analysis of the plaintiff's claimed injury "to determine whether it is of the type that the antitrust statute was intended to forestall." 459 U.S. at 540.[9] The Court found that the *Brunswick* test was not satisfied in the *Associated General Contractors* case, even though the plaintiff had alleged a group boycott, *per se* illegal under Sherman Act § 1 (459 U.S. at 528), which was intended to, and assumedly did, injure the plaintiff. 459 U.S. at 540.

The Court addressed antitrust injury most recently in *Cargill*. The Court there reaffirmed that a plaintiff always

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[9] The Court also explained that the result in *McCready* turned on the fact that the plaintiff's injury was "'inextricably intertwined'" with the injury that reflected the anticompetitive effect that made defendants' conduct unlawful. 459 U.S. at 538 & n.39 (*quoting McCready*, 457 U.S. at 484).

must show antitrust injury as a first step in establishing standing: Antitrust injury "is necessary, but not always sufficient, to establish standing under § 4. . . ." 479 U.S. at 110 n.5. It also extended the antitrust-injury requirement to actions for injunctions under section 16. 479 U.S. at 113. The *Cargill* Court further reaffirmed as the test of antitrust injury that the plaintiff's claimed loss must be "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* (*quoting Brunswick*, 429 U.S. at 489). Because the *Cargill* plaintiff claimed injury from increased price competition, the Court was able to dispose of the claim once it determined that the challenged prices were not predatory. 479 U.S. at 119.

B. The Ninth Circuit Relies Upon Two Incorrect Presumptions Rather Than Upon The Antitrust-Injury Analysis Announced In This Court's Opinions

The Ninth Circuit opinion substitutes its own erroneous presumptions for both elements of the antitrust-injury analysis required by this Court. Instead of examining the loss claimed by the particular plaintiff before the court, the Ninth Circuit presumes that antitrust injury can be assumed where the defendant's violation causing plaintiff's injury is *per se* illegal. And, instead of examining the precise anticompetitive effects that make the type of price fixing challenged here unlawful, the Ninth Circuit presumes that all types of price fixing are the same for antitrust-injury analysis. As demonstrated below, neither of these presumptions squares with the historical and policy underpinnings of the antitrust-injury requirement reviewed above.

1. The Ninth Circuit incorrectly presumes that *per se* illegality converts all causally related loss into antitrust injury

The Ninth Circuit opinion accepts uncritically the proposition that the *per se* illegality of vertical maximum price fixing automatically makes USA's claimed financial losses from "ARCO's illegal price-fixing . . . the type of injury that the antitrust rules were meant to prevent." 859 F.2d at 696. Thus, that statement follows several references to the *per se* illegality of the alleged "illegal price-fixing." For example, the opinion states only a few sentences earlier that "[t]he Supreme Court has clearly stated – and restated – that maximum resale price maintenance, as a form of price fixing, is *per se* illegal, and that rule binds us until the Court or Congress clearly states otherwise." *Id*. The Ninth Circuit's statement that it is bound by this Court's opinions on *per se* illegality confirms its belief that those decisions on substantive illegality control the antitrust-injury issue presented here.

The Ninth Circuit thereby confuses two analytically distinct antitrust principles. Their distinctness arises at a root level from the different statutes on which each is based: Antitrust injury is based on Clayton Act § 4 and *per se* illegality on Sherman Act § 1. Furthermore, each serves totally distinct purposes: The antitrust-injury requirement prevents recoveries in private actions that are at best fortuitous in light of antitrust policy and may even be anticompetitive. The *per se* rule obviates proving in both government and private actions that conduct is anticompetitively unreasonable, and therefore in violation of Sherman Act § 1, where such unreasonableness can be categorically presumed. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) ("*Sylvania*").

The different origins and purposes of these two concepts cause each to depend upon totally different circumstances. *Per se* illegality depends upon effects in the market as a whole:

> "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition."

NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 103-04 (1984); *see National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) ("In either [*per se* or rule of reason cases], the purpose of the analysis is to form a judgment about the competitive significance of the restraint"); *Sylvania*, 433 U.S. at 49-50. Those violations proved by a *per se* presumption and those proved by a rule of reason determination both turn on a finding, be it explicit or implicit, that the anticompetitive market effects outweigh any procompetitive market effects of defendant's conduct. Conduct that is *per se* illegal, like conduct that is illegal under the rule of reason, can have effects that are of no concern to the antitrust laws (in the sense that they do not reflect the reasons why the conduct is unlawful) and can even have procompetitive effects. *Sylvania*, 433 U.S. at 50 n.16.

Antitrust injury, on the other hand, depends upon the effects of the challenged conduct on the plaintiff and not

on any other market participant. *See* pp. 12-17 above. A person who suffers loss as a result of either a neutral or a procompetitive effect of a *per se* violation does not suffer antitrust injury. Accordingly, even where a *per se* violation is assumed, the antitrust-injury inquiry asks whether the relationship between the reasons for the illegality and the plaintiff's loss is of the type that will permit an antitrust recovery. Antitrust injury exists only where the plaintiff's injury reflects the reason for imposing *per se* illegality.

This conclusion is implicit in the Court's decision that the plaintiff did not satisfy the antitrust-injury test in *Associated General Contractors,* because the conspiracy assumed there was *per se* illegal. *See* 459 U.S. at 528. Several panels of the Seventh Circuit have reached this conclusion more explicitly.[10] *Indiana Grocery,* 864 F.2d at 1419; *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986); *Jack Walters,* 737 F.2d at 709. *Indiana Grocery* explicitly rejected the argument, which was accepted by the Ninth Circuit panel in this case, that *per se* illegality under the Sherman Act (coupled with causal injury) establishes antitrust injury under section 4 of the Clayton Act:

> "[T]he mere presence of a substantive Sherman Act section 1 violation – again, *per se* or not – does not by itself bestow on any plaintiff a private right of action for damages . . . . While sections 1 and 2 of the Sherman Act focus on competitive conditions in the market as a whole, section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be 'antitrust injury.'"

864 F.2d at 1419 (citation omitted).

2. The Ninth Circuit fails to account for the diverse effects on competition of different types of price fixing

The antitrust-injury analysis also requires an examination of the anticompetitive effects that make the challenged conduct unlawful. Even though USA's claimed losses resulted from *vertical maximum price fixing,* the Ninth Circuit opinion states that:

> "the proper question is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent."

859 F.2d at 694. The Ninth Circuit purports to justify this proposition with the assertion that "[t]he Supreme Court has not discussed maximum resale price maintenance as a separate type of antitrust violation, but only as one form of price fixing." 859 F.2d at 693-94.

The assertion and its purported justification misstate this Court's antitrust-injury and price-fixing opinions. The antitrust-injury opinions require that the focus be on the specific anticompetitive effects that result in substantive illegality and not on any broad categorization into which the conduct at issue may fit. *Cf. Sylvania,* 433 U.S. at 59 (antitrust illegality "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing"). For example, both the *Brunswick* and *Cargill*

[10] In addition to the Ninth Circuit, only the Fourth Circuit has confused "antitrust injury" with *per se* illegality. *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979) ("[T]he rationale of *Brunswick* . . . may not be as readily applicable in cases which . . . charge *per se* violations of the Sherman Act").

opinions discuss the precise anticompetitive effects that would make the mergers involved therein illegal, as they were assumed to be:

> "If the acquisitions here were unlawful, it is because they brought a 'deep pocket' parent into a market of 'pygmies.' Yet respondents' injury – the loss of income that would have accrued had the acquired centers gone bankrupt – bears no relationship to the size of either the acquiring company or its competitors."

Brunswick, 429 U.S. at 487; *see Cargill*, 479 U.S. at 114. They do not discuss the panoply of anticompetitive effects that can be produced by different types of illegal mergers.

A rifle-shot, rather than a shot-gun, focus is required, for conduct violates the antitrust laws not because it falls within a certain category but because it produces certain anticompetitive effects. As this Court recently stated in *Sharp:*

> "The term 'restraint of trade' in the [Sherman Act], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence. . . ."

108 S. Ct. at 1523.

This principle applies to all restraints, including price fixing, as the Court has made clear in many opinions discussing the different types of price fixing. All restraints can be categorized by the relationship between the parties to the agreement:

> "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement

> between firms at different levels of distribution as vertical restraints."

Sharp, 108 S. Ct. at 1522-23. Price fixing can be further categorized as either maximum price fixing, which sets ceilings above which prices cannot rise, and minimum price fixing, which sets uniform prices or floors below which prices cannot fall. *See Albrecht v. Herald Co.*, 390 U.S. 145, 156 (1968) ("*Albrecht*") (Harlan, J., dissenting).

The Court repeatedly has recognized the significant economic differences between horizontal and vertical restraints and between maximum and minimum price fixing. Most recently, it stated that:

> "This notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality was explicitly rejected in *GTE Sylvania* . . . ."

Sharp, 108 S. Ct. at 1524. The *Sylvania* opinion heralded not only an appreciation of the need to distinguish vertical from horizontal restraints but of the related need to distinguish restraints on intrabrand competition from restraints on interbrand competition. The Court in *Sylvania* announced that interbrand competition, which it defined as "the competition among the manufacturers of the same generic product," was the "primary concern of antitrust law." *Sylvania*, 433 U.S. at 52 n.19. It there implicitly recognized that intrabrand competition, "the competition between the distributors – wholesale or retail – of the product of a particular manufacturer," (*id.*) is of concern only to the extent that there is also a demonstrable adverse effect on interbrand competition. *Id.* Of most significance here, the Court noted that:

> "The market impact of vertical restrictions is complex because of their potential for a simultaneous

reduction of intrabrand competition and stimulation of interbrand competition."

479 U.S. at 51-52; *see 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 341-42 (1987) ("[A] vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition") (citation omitted); *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348 n.18 (1982) ("[H]orizontal restraints are generally less defensible than vertical restraints").

Admittedly, in so describing the differences between horizontal and vertical restraints, the Court has distinguished between vertical *price* and *non-price* restraints and has reaffirmed that vertical price restraints remain *per se* illegal. The distinctions, however, are not significant here. After *Sylvania,* the Court has distinguished between vertical price and non-price restraints only with respect to vertical *minimum* price fixing.[11] Vertical maximum price fixing has quite different economic effects. Indeed, the potential for stimulation of interbrand competition is the greatest when the vertical intrabrand

[11] Most recently, in *Sharp,* the Court distinguished vertical price from non-price restraints on the ground "that vertical price restraints reduce *inter*brand price competition because they 'facilitate cartelizing.' " 108 S. Ct. at 1520 (citation omitted). That obviously is a concern only where minimum price fixing is involved. *See* p. 25-26 n.12 below. The *Sharp* Court there referred back to footnote 18 of *Sylvania,* in which the Court limited its holding (although not its analysis) to non-price vertical restrictions. 433 U.S. at 51 n.18. That footnote similarly discussed effects presented only by minimum price fixing.

restraint directly *reduces* prices. Intrabrand price reductions will cause the sellers of competing brands either to reduce their prices or convince consumers of the superiority of their products at the non-reduced prices. This is the essence of competition.

Even while adhering to the *per se* illegality of maximum price fixing, the Court has recognized that it presents different economic issues. In *Albrecht,* 390 U.S. at 152, the majority opinion stated: "Maximum and minimum price fixing may have different consequences in many situations." The Court adhered to the rule making maximum vertical price fixing *per se* illegal, citing economic consequences different than those involved in minimum price fixing. *See* pp. 31-32 below. Justice Harlan, dissenting, stated the economic truth that maximum and minimum price fixing are not "economically equivalent." 390 U.S. at 156. Justice Harlan noted that the effects of minimum price fixing were "higher prices, less efficient use of resources, and an easier life for the resellers," which were the same anticompetitive effects presented by a horizontal price-fixing conspiracy of the dealers. 390 U.S. at 157. Accordingly, minimum price fixing "lessens horizontal interbrand competition" and "act[s] to the direct detriment of the public interest as viewed in the Sherman Act." *Id.* On the other hand, the price ceilings imposed by vertical maximum price fixing "do not lessen horizontal competition" but instead "drive prices toward the level that would be set by intense competition." 390 U.S. at 159.[12] In short, vertical maximum price fixing can

[12] Vertical maximum price fixing may be distinguished from vertical minimum price fixing, because only the latter can

(Continued on following page)

have the direct procompetitive effect of "prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits." *Id.*

This brief review amply refutes the Ninth Circuit's assertion that the Court's opinions have not separately discussed either the reason why vertical maximum price fixing is condemned or the economic effects resulting therefrom. More importantly, as discussed below, when the focus is placed specifically on vertical maximum price fixing, it is clear that USA's claimed losses as a competitor do not satisfy any of the *Brunswick* formulations for ascertaining antitrust injury.

C. The Correct Analysis Shows That USA's Injury As A Competitor Does Not Reflect The Anticompetitive Effects That Make Vertical Maximum Price Fixing Unlawful

The *Brunswick* opinion sets forth several slightly different articulations of the gist of antitrust injury. The first

(Continued from previous page)

have a proscribed horizontal effect. Vertical minimum price fixing is likely to result from dealer pressure on the manufacturer, because price floors are in the interest of the dealers, not of the manufacturer (which should want the lowest feasible prices to maximize its sales volumes). *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, II*, 75 Yale L.J. 373, 403-07 & n.68 (1966). Price ceilings, however, are in the manufacturer's, not the dealers', interest and therefore are likely to be imposed unilaterally by the manufacturer. As a result, vertical maximum price fixing closely resembles the single manufacturer vertical restraints described in *Sylvania* and *324 Liquor*. *See* Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n.20 (1981) ("Maximum resale price fixing has none of the potential anticompetitive consequences of horizontal maximum price fixing . . . ").

requires that the plaintiff's loss be linked to the reasons why the conduct is illegal – the loss must be the type that "the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. The second requires that the plaintiff's loss be linked to the economic rationale for illegality – the loss must reflect the "anticompetitive effect . . . of the violation." *Id.* The third acts as a check on the first two by asking if the plaintiff "would have suffered the identical 'loss' – but no compensable injury" in the absence of that which makes the acts unlawful. 429 U.S. at 487. As demonstrated below, USA's loss from the competition of ARCO prices assumedly lowered by unlawful vertical maximum price fixing fails to satisfy any of these articulations.

1. USA's injury is not the type that the rule against vertical maximum price fixing was intended to prevent

The Court first identified the reason why vertical maximum price fixing is *per se* illegal in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). *Kiefer-Stewart* involved a horizontal agreement among liquor companies to impose maximum resale prices on their dealers. 340 U.S. at 213. The Court identified the following single reason for holding such an agreement *per se* illegal:

> "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Id. The Court in *Albrecht*, 390 U.S. at 152, cited this

language as the reason to "adhere" to the rule of *Kiefer-Stewart*.[13]

Accordingly, both *Kiefer-Stewart* and *Albrecht* identify the defendants' coerced dealers as the class intended to be protected by the proscription against vertical maximum price fixing. It is the coerced dealers (referred to as "traders") whose freedom is crippled and whose ability to price in accordance with their own judgment is restrained. This conclusion does not follow simply from the above-quoted language. The conclusion also follows ineluctably from the fact that successful coercion of the dealer is the essence of vertical maximum price fixing. Without such coercion there simply is no illegality. Or, to put it in *Brunswick* terms, coercion is "that which makes defendants' acts unlawful." 429 U.S. at 489.

The *Albrecht* opinion clearly held that successful supplier coercion was required for vertical maximum price fixing. It stated that the plaintiff newspaper courier "could have claimed a combination between [the newspaper] and himself, *at least as of the day he unwillingly complied with [the newspaper's] advertised price.*" 390 U.S. at 150 n.6 (emphasis added).[14] And, the Court described the unlawful combination as one "to *force* [plaintiff] to conform to the advertised retail price." 390 U.S. at 149

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[13] The *Albrecht* Court also identified several anticompetitive effects that might result from the dealers' loss of pricing freedom, as discussed at pp. 31-32 below.

[14] The unlawful combination actually found in *Albrecht* was between the newspaper, an agency hired to solicit plaintiff's customers and other carriers. 390 U.S. at 149.

(emphasis added).[15] The Circuit Courts consistently have followed this holding by ruling that it is the dealer's loss of pricing discretion (when he succumbs to his supplier's price coercion) that separates lawful price suggestion from unlawful vertical price fixing.[16]

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[15] The Court there also stated that in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), "[t]he combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination. . . ." 390 U.S. at 149.

[16] *See, e.g., Belfiore v. New York Times Co.*, 826 F.2d 177, 181 (2d Cir. 1987) (no vertical maximum price fixing because "no coerced pricing occurred"; competition that pressures a firm to lower its prices is "precisely the conduct the antitrust laws were designed to foster, not suppress"), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1030 (1988); *Bender v. Southland Corp.*, 749 F.2d 1205, 1212 & n.4 (6th Cir. 1984) ("Establishing a *per se* violation of the Sherman Act in a private action brought under a vertical price fixing theory requires proof . . . [that] the defendant . . . coerced the plaintiff into charging higher or lower prices"; *Albrecht* "supports the notion that coercion must be demonstrated in a private action brought under a vertical price fixing theory"); *Arnott v. American Oil Co.*, 609 F.2d 873, 885 (8th Cir. 1979) (vertical maximum price fixing found through evidence that "dealers were forced by means of threats and other coercive tactics to set gasoline retail prices at prices fixed by" the supplier), *cert. denied*, 446 U.S. 918 (1980); *Santa Clara Valley Distrib. Co. v. Pabst Brewing Co.*, 556 F.2d 942, 945 & n.3 (9th Cir. 1977) (vertical price fixing "theory required that plaintiffs show the requisite degree of enforcement coercion by Pabst"); *Chisolm Bros. Farm Equipment Co. v. Int'l Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.) ("The crux of any price fixing agreement is the relinquishment by the trader . . . of the freedom to set prices in accordance with his own judgment"), *cert. denied*, 419 U.S. 1023 (1974).

This principle is significant to the District Court's antitrust-injury decision here. A gasoline supplier can be found to have engaged in vertical price fixing only where the "dealers succumbed to" its price coercion. *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1343 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984), *citing Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355-57 & n.3 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *see also Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). Those opinions establish that a gasoline supplier may seek lower dealer prices through " 'exposition, persuasion and argument' " (*Gray*, 469 F.2d at 748 (citation omitted)) and discounts or subsidies to the dealers. *Petroleum Products*, 691 F.2d at 1343; *Hanson*, 541 F.2d at 1357. The supplier, however, cannot cross the line by coercing dealer compliance with its price suggestions.

USA's complaint alleges that ARCO engaged in various kinds of conduct to lower the retail prices at ARCO stations. (*See* JA 17-20.) Only coercive conduct that succeeded in depriving the dealers of pricing discretion will support a claim of vertical maximum price fixing. Accordingly, the District Court's assumption that ARCO engaged in unlawful vertical price fixing (Pet. App. B, ¶ 5) simply accepted for purposes of the motion that USA could prove that an ARCO dealer (or dealers) competing with USA succumbed to ARCO's price coercion. That might be sufficient under existing law to establish illegality, but it is not sufficient to establish antitrust injury, because USA's loss is not the reason for the assumed illegality.

2. USA's injury does not reflect the anticompetitive effects that make vertical maximum price fixing unlawful

The Court in *Albrecht* did not simply rest its decision on the dealer's loss of pricing freedom. It also identified several adverse economic effects that it believed could result from the dealer's loss of the ability to charge higher prices:

> "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of *buyers* to compete and survive in that market. . . . Maximum prices may be fixed too low for the *dealer* to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price-fixing may channel distribution through a few large or specifically advantaged *dealers* who otherwise would be subject to significant nonprice competition."

390 U.S. at 152-53 (emphasis added).

Each of these anticompetitive effects refers to injuries suffered by the coerced dealers or by their customers. The intrusion on the "ability of *buyers* to compete and survive" refers to the coerced dealers' lost revenue as a result of not being able to price above the ceiling, as the Court makes clear by the language that follows: The maximum prices may be "too low for the *dealer*" to furnish all of the services that he and his customers may desire. Similarly, the possibility that price ceilings may channel distribution through a few large or specifically advantaged dealers refers to indirect effects on the coerced dealers as a result of having lost this revenue.

Such dealers may not be able to offer services and other types of non-price competition that they could have offered if they could have charged higher prices.

The *Albrecht* opinion refers to only one other possible anticompetitive effect justifying the *per se* rule against vertical maximum price fixing: where the actual price is almost always the maximum price "the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 153. This effect refers to the possibility that the price fixing might result in prices higher than otherwise would have prevailed. Competitors are not the intended beneficiaries to the extent that the rule is premised on this effect. Indeed, competitors are benefitted, not hurt, when the dealers with which they compete are compelled to charge higher prices or offer fewer services. *Cf. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 n.20 ("*Matsushita*"). The consumers, who pay the higher prices, are the intended beneficiaries of the rule against minimum price fixing.

As the above discussion demonstrates, neither *Kiefer-Stewart* nor *Albrecht* identifies competitors of the coerced dealers as a protected class. Nor does either opinion identify any injuries to such competitors as a reason for imposing *per se* illegality.

3. USA would have suffered the identical loss – but not compensable injury – from lower ARCO prices set by conduct not amounting to price fixing

The Court in *Brunswick* illustrated the correctness of its antitrust injury decision by noting that the plaintiffs'

injury bore no relationship to the reasons for the assumed illegality. The mergers were assumed to be unlawful because they "brought a 'deep pocket' parent into a market of 'pygmies.'" However, as the Court noted, the plaintiffs' injury was unrelated to the size either of the defendant (*i.e.*, that it had a deep pocket) or of its competitors (that they were "pygmies"). The plaintiffs

> "would have suffered the identical 'loss' – but no compensable injury – had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents. . . ."

429 U.S. at 487.

An analogous illustration confirms that USA's claimed losses here are not antitrust injury. USA's claimed lost profits and sales resulted from the lower prices at competing ARCO stations. The lower prices at ARCO stations, in turn, resulted from price allowances granted by ARCO allegedly to "facilitate[] control by ARCO of the resale prices charged by its branded distributors and dealers." (JA 18.) USA stated the proposition more bluntly in its Reply Brief in the Ninth Circuit, which describes the gravamen of ARCO's conduct injuring USA as "fix[ing] prices that ARCO dealers could not charge absent ARCO's subsidy . . . ." (USA Reply Brief, at 1.) USA thus claims that it lost profits and sales as a result of the dealer's pass-through of the "subsidy" granted it by ARCO. But, USA would have suffered the same losses whether that pass-through resulted from ARCO's lawful "exposition, persuasion and argument" or unlawful coercion. USA's losses, in sum, resulted from the lower prices and not from the dealers' assumed loss of their pricing

independence.[17] Therefore, just as in *Brunswick*, USA's claimed losses bear no relationship to the reasons for the assumed illegality.

D. The Ninth Circuit Rule Perverts The Antitrust-Injury Requirement By Permitting A Competitor Lawsuit That Is Inimical To The Purposes Of The Antitrust Laws

The Ninth Circuit rule does not merely permit an antitrust claim that is of no concern to the applicable antitrust policy. In permitting a competitor to recover for losses resulting from increased nonpredatory competition, the rule sanctions claims that are contrary to the fundamental purposes of the antitrust laws. Such a result directly conflicts with this Court's opinions in *Brunswick* and *Cargill* and is fundamentally inconsistent with the non-antitrust-injury opinions in *Sharp* and *Matsushita*.

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[17] Indeed, USA claimed identical losses from the low ARCO prices at stations owned by ARCO. Nine of the 102 ARCO stations that USA claimed caused its injury are ARCO-owned. *See* p. 4 n.2 above. Certainly, the dismissal of USA's Sherman Act § 2 claim rendered those losses not compensable injury, because intra-ARCO conduct cannot violate Sherman Act § 1. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). But, USA claimed the exact same injury from these prices as it continues to claim from the assumed price fixing at the other stations, thus demonstrating that USA's losses resulted from the lower prices and not the unlawful conspiracy. Similarly, USA will not have suffered compensable injury at any of the remaining 93 stations where it cannot establish both ARCO coercion and the dealer's succumbing because it will have failed to establish an antitrust violation. Nonetheless, it will have suffered the same losses from low prices at those stations.

1. Consumer welfare is the primary concern of the antitrust laws and the touchstone of antitrust injury

The Court in *Brunswick* established the consumer interest in competition as the touchstone of antitrust injury. Thus, the Court stated that it would be "inimical to the purposes of" the antitrust laws to award damages for losses from increased competition, because "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick*, 429 U.S. at 488 (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Court in *Cargill* reaffirmed that lost profits resulting from increased competition cannot be antitrust injury. 479 U.S. at 117.

These antitrust-injury opinions accord with the Court's other pronouncements concerning the purposes for which the Sherman Act was enacted and the class of persons it was intended to protect. "Congress designed the Sherman Act as a 'consumer welfare prescription.' " *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (*quoting* R. Bork, *The Antitrust Paradox* 66 (1978)).[18] Interbrand competition leads to lower prices to consumers and for that reason is " 'the primary concern of antitrust law.' " *Sharp*, 108 S. Ct. at 1519 (*quoting Sylvania*, 433 U.S. at 52 n.19).[19]

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[18] *See also* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & Econ. 7, 10 (1966).

[19] The Circuit Courts have followed this Court's lead. *See, e.g., Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989) ("The Sherman Act's very purpose is to help consumers, in part by bringing about low, nonpredatory

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A rule disallowing antitrust claims for losses resulting from price cutting or other forms of increased competition also accords with the Court's admonition in *Matsushita*, 475 U.S. at 594, not to permit use of the antitrust laws to stifle competition. After noting that "cutting prices in order to increase business often is the very essence of competition," the Court warned against creating rules that could discourage price cutting and thereby "chill the very conduct the antitrust laws are designed to protect." *Id.; see Cargill*, 479 U.S. at 121 n.17. The Seventh Circuit applied this policy in the antitrust-injury context:

> "Whenever the plaintiff and consumers have divergent rather than congruent interests, there is a potential problem in finding 'antitrust injury.' . . . When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust."

Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance,

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prices"); *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987) ("Conduct that harms competitors may benefit consumers – a result the antitrust laws were not intended to penalize"), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2830 (1988); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process – which means . . . to discourage practices that make it hard for consumers to buy at competitive prices – rather than to promote the welfare of particular competitors"), *cert. denied*, 477 U.S. 1018 (1985); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981) (the antitrust laws "do not prohibit non-predatory conduct that results in a lower price to the consumer. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors"), *cert. denied*, 455 U.S. 1018 (1982).

Inc., 784 F.2d 1325, 1334 (7th Cir. 1986); *see Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.*, 826 F.2d 1235, 1241 (3d Cir. 1987) ("Mindful that antitrust law aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer"), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2830 (1988); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 34-36 (1984).

The Ninth Circuit opinion violates these principles by completely ignoring the direct benefit to consumer welfare from the lower ARCO prices challenged here.[20] Moreover, it in fact rejects the *Brown Shoe* "aphorism" (859 F.2d at 695) by holding that the "antitrust laws were . . . intended to give entrepreneurs . . . an 'even playing field.' " 859 F.2d at 697. The Ninth Circuit thereby treats as equivalents injury to a competitor and injury to the competitive process. But, these two most definitely are not equal in the eyes of antitrust. The Ninth Circuit's contrary conclusion is not only conceptually incorrect, but, as demonstrated at pp. 43-44 below, on the facts of this case actually threatens consumer welfare.

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[20] The Ninth Circuit does state that "the long-term consequences [of maximum price fixing] may be higher prices and reduced services to consumers." 859 F.2d at 696. To support that proposition, it cites *Albrecht* and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The *Albrecht* opinion contains no such statement and *Socony-Vacuum* involved horizontal minimum price fixing. More importantly, as discussed at pp. 43-44 below, the District Court's unchallenged findings in this case specifically refute that generalized conclusion.

2. Vertical maximum price fixing can injure consumer welfare and inflict antitrust injury only where the resulting price ceilings pose a dangerous probability of monopoly

This Court's recent opinions in *Cargill* and *Matsushita* confirm that artificially low prices threaten consumer welfare only where they create a dangerous probability of future supracompetitive pricing. Only prices that so threaten consumer welfare are predatory and, as the Court in *Cargill* held, "capable of inflicting antitrust injury." 479 U.S. at 118.

In *Cargill*, the Court rejected the claim that the illegal merger could inflict antitrust injury through "sustained predatory pricing" aimed at plaintiff. 479 U.S. at 117. The Court concluded that the plaintiff had neither raised nor proved a claim of predatory pricing in the district court.[21] 479 U.S. at 119. The Court also suggested that the district court's findings on market share and barriers to entry would have precluded a claim of predatory pricing necessary for antitrust injury, even if one had been made. 479 U.S. at 119 n.15.

The Court defined predatory pricing as

> "pricing below an appropriate measure of cost for the purpose of eliminating competition in the short run *and reducing competition in the long run*. It is a practice that harms both competitors *and competition*. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim *the elimination of competition*."

[21] Similarly, USA neither raised the issue whether, nor proffered any evidence that, the challenged ARCO prices were predatory. *See* p. 43-44 n. 27 below.

479 U.S. at 117-18 (emphasis added). The Court further described "the elimination of competition," as it used the phrase in this definition, as the creation of monopoly power required for supracompetitive pricing. This is explicit in the Court's statement that the long-run gain from predatory pricing

> " 'depends on successfully neutralizing the competition . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.' "

479 U.S. at 121 n.17 (*quoting Matsushita*, 475 U.S. at 589). And, it is implicit in the Court's statement that defendant's "21% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing." 479 U.S. at 119 n.15.

In *Matsushita*, the Court similarly defined predatory pricing. Part IV.A of that Opinion, citing articles by Professors Bork, McGee and Easterbrook, repeatedly defined predatory pricing in terms of future monopoly power. *See* 475 U.S. at 588-93. The Court there stated:

> "[T]he conspirators must have a reasonable expectation of recovering, *in the form of later monopoly profits*, more than the losses suffered. . . . Moreover, it is not enough simply to achieve *monopoly power*, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain*."

475 U.S. at 589 (emphasis (except for the Court's emphasis on "maintaining") added).

Matsushita reinstated the district court's summary judgment, which had been based on the plaintiffs' failure to establish "a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury." 475 U.S. at 585-86. In order to determine if plaintiffs had raised such an issue, the Court had to identify the type of conspiracy that could cause plaintiffs a "cognizable injury." *Id.* The Court did not find, and the plaintiffs (unlike USA in this case) did not even contend, that a conspiracy merely to set lower prices could inflict antitrust injury on the plaintiffs, who were competitors of the defendants.[22] Rather, the only conspiracy that could "have caused [plaintiffs] to suffer an 'antitrust injury' " was a "conspiracy to monopolize the American market through predatory pricing. . . ." 475 U.S. at 586. The Court

[22] The Court, however, did find that a conspiracy not involving "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost" could *not* cause plaintiff's antitrust injury. 475 U.S. at 584-85 n.8. The Court made clear in three respects that footnote 8 stated only that below-market or below-cost pricing is *necessary*, but not that it is *sufficient*, for antitrust injury. First, the relevant sentence begins with the qualification: "For purposes of this case, it is *enough to note*." (Emphasis added.) Second, the concluding sentences of the footnote confirm that it deals only with the threshold, cause-in-fact aspect of antitrust injury, and not with the *Brunswick* requirement. Third, as demonstrated above, the Court described the only conspiracy that could inflict injury cognizable under *Brunswick* as one "to monopolize the American market through predatory pricing." 475 U.S. at 586.

therefore held that only "a genuine issue concerning the existence of a predatory pricing conspiracy" (not merely a price fixing conspiracy) could defeat defendants' summary judgment motion. *Id.*

The Court's focus in *Matsushita* and *Cargill* on the danger of creating a market structure that would permit future monopoly pricing as the standard for predatory pricing is fully supported by commentators,[23] antitrust enforcers[24]

[23] *See, e.g.*, Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 292 (1977) (60 percent share necessary); Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337, 1348 (1978) (60 percent figure too low), *both cited in Cargill*, 479 U.S. at 119-120 n.8.

[24] *See, e.g.*, May 15, 1989 letter from the Federal Trade Commission to the Texas State Senate, commenting on a proposed bill to outlaw certain forms of below cost pricing:

> "To screen out those cases in which predatory pricing is unlikely. . . . [The] initial inquiry focuses on whether a market is so structured and so protected by entry barriers that predation is a realistic possibility. The Commission has followed this approach in its own most recent predatory pricing cases. In dismissing the charges in these cases, the Commission found it unnecessary to reach a detailed examination of evidence relating to either intent or conduct. Rather, the Commission observed in each case that the market structure and the vigor of current competition precluded any dangerous probability that below cost pricing, if it had occurred, could have led to sustained monopoly power.
>
> "This phased approach permits careful evaluation of predatory pricing complaints, yet also reduces the

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and the Courts of Appeal.[25] Moreover, any other definition would impermissibly elevate the interests of competitors over the interests of consumers. The losses to competitors from low prices that cannot lead to successful predation represent gains to consumers that will never be offset by future supracompetitive prices.

3. The Ninth Circuit rule, not the low ARCO prices challenged here, poses a threat to consumer welfare

The Ninth Circuit nonetheless would permit a competitor to recover its losses from *nonpredatory* prices restrained by vertical maximum price fixing. This rule would compensate competitors for profits lost as the result of low prices that both benefitted consumers in the short run and did not pose any threat to consumer

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resources necessary to assess them, because market structure and entry barrier information typically is more available and less ambiguous than evidence regarding an individual firm's cost levels or intent to monopolize. In addition, reliance on market evidence limits the risk that a law enforcement investigation might chill legitimate price competition."

FTC Letter, at 6-7.

[25] *See, e.g., Transamerica Computer Co. v. IBM Corp.*, 698 F. 2d 1377, 1384 (9th Cir.) ("Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time"), *cert. denied*, 464 U.S. 955 (1983).

welfare in the long run. By definition, that is inimical to consumer welfare.

The Ninth Circuit seeks to justify its rule by citing possible long-term adverse effects on consumers.[26] However, the unsupported assertion that such effects could result is inconsistent both with the definition of nonpredatory prices (*see* pp. 38-42 above) and with the unchallenged findings of the District Court that the ARCO prices are not predatory.

The District Court explicitly found that the challenged prices are not predatory. First, the District Court established pursuant to Fed. R. Civ. Proc. 56(d) undisputed facts showing the absence of threatened monopolization. (Pet. App. B, ¶¶ 1-4.) These findings were based upon a substantial and undisputed factual record showing the absence of any conceivable danger that ARCO-brand sellers could obtain monopoly power in the gasoline market that might enable them later to raise prices to supracompetitive levels and thereby to recoup their losses during the period of alleged predation. (*See* Dckt. NR 80.)[27] Then, ruling that USA could not establish anti-

[26] *See* 859 F.2d at 694 ("Even if we were to analyze the question at the more specific level of maximum resale price fixing, given the long-term consequences of that practice we would reach the same result for similar reasons"), 696 ("[W]hen firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced services to consumers").

[27] ARCO moved for summary judgment on the ground that USA's injury from the prices at ARCO service stations

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trust injury "without showing such [vertically-imposed maximum] prices to be predatory," the District Court further found: "[u]nder the circumstances here concerned . . . no such showing can be made." (Pet. App. B, ¶ 5.)[28]

The District Court's findings establish that the low ARCO prices challenged by USA can only benefit consumers. In these circumstances, the allowance of USA's antitrust action challenging those prices injures consumers. Moreover, the allowance of such actions gener-

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could "constitute[] 'antitrust injury' for Clayton Act purposes only if those prices are 'predatory' " in that they "create[] the dangerous probability that the defendant(s) may achieve a monopoly with the concomitant ability to raise prices in the future." Memorandum In Support Of Motion For A Pretrial Order, etc., at 10, 16-18. (Dckt. NR 83.) ARCO's motion placed the burden on USA of proffering evidence that the ARCO prices were predatory or an affidavit pursuant to Fed. R. Civ. P. 56(f) explaining that it needed additional discovery to prove that the prices were predatory. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). USA elected not to challenge that showing, but to contend only that the issue whether the prices were predatory was irrelevant, because vertical maximum price fixing is *per se* illegal. *See, e.g.*, Plaintiff's Statement of Genuine Issues, etc., ¶¶ 1-3 (JA 86-87). USA sought additional discovery to prove conspiracy, not predatory pricing. *See* 10/14/86 Transcript of Hearing on ARCO's Summary Judgment Motion, at p. 10, lines 22-24 (When asked by the District Court "what are you going to find . . . through this discovery," USA's counsel responded "[a] conspiracy . . . ").

[28] USA did not challenge on appeal this finding or the undisputed facts on which it was based. Accordingly, the issue of whether the challenged prices were predatory is not before this Court. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958).

ally will discourage manufacturers whose products reach consumers through resellers from embarking on price cutting programs.[29] The Court therefore should announce an antitrust-injury rule precluding competitor actions challenging nonpredatory vertical maximum price fixing.

[29] The danger of such actions is compounded by the fact that a competitor could contend, as USA has done here (*see* Petition, at 26-27 n.9 (*quoting* Dckt. NR 84 (at pp. 47-48))), that it can use as evidence of maximum price fixing (i) the manufacturer's subsidization of its dealers' lower prices by granting discounts, (ii) the manufacturer's suggestion of lower prices to its dealers and (iii) decreases in the dealers' prices following decreases in the manufacturer's wholesale prices. The threat of a competitor lawsuit could cause a manufacturer "to forgo legitimate and competitively useful conduct rather than risk treble damages. . . ." *Sharp*, 108 S. Ct. at 1521; *see Cargill*, 479 U.S. at 121 n.17; *Matsushita*, 475 U.S. at 594-95; Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985).

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed and the summary judgment of the District Court reinstated.

August 3, 1989.

Respectfully submitted,

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(10)

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

BRIEF OF RESPONDENT USA PETROLEUM COMPANY

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QUESTIONS PRESENTED

1. Does the per se condemnation of vertical maximum price-fixing presume anticompetitive effect in the interbrand market such that a competitor's losses constitute antitrust injury?

2. Assuming arguendo that the per se rule presumes anticompetitive effects only in the intrabrand market, must a competitor prove, in order to demonstrate antitrust injury, that the price-fixers:

   a. unreasonably restrained trade in the interbrand market under a Sherman Act § 1 rule of reason standard; or

   b. had a dangerous probability of successful monopolization in the interbrand market under a Sherman Act § 2 standard?

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COUNTERSTATEMENT OF THE CASE

USA Petroleum Company ("USA"),[1] one of the few remaining independent gasoline marketers in California,[2] buys gasoline from refiners and sells gasoline at retail to consumers. (J.A. 11.)

ARCO is one of the seven major integrated oil companies that produce, refine and market petroleum products in California. ARCO markets branded gasoline at wholesale to independently owned ARCO-brand stations and at retail through company-owned stations. (J.A. 11-14.) USA competes with both types of ARCO-brand stations. (J.A. 15.)

ARCO's Scheme to Eliminate Independents from the Market

The major integrated oil companies dominate the retail gasoline market in California. These large competitors have generally refrained from aggressive price competition. (J.A. 13.) Historically, the independent marketers competed on price, affording consumers gasoline at prices below those of the majors. (J.A. 14.)

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[1] There are no changes to the statement of Respondent's Non-Wholly Owned Subsidiaries and Affiliates that appears as footnote 1 to Respondent's Brief in Opposition to Petition for Certiorari. This brief uses "J.A." to refer to the Joint Appendix and "Dckt NR" to refer to docket numbers on the list of Relevant Docket Entries.

[2] While this brief refers to California for ease of reference, USA also has stations in Washington and Nevada.

Beginning in April 1982, ARCO implemented a scheme to eliminate independents and the price competitive force they represented in the marketplace. (J.A. 17.) ARCO targeted the ARCO-branded dealers who competed directly with USA and other independents, and fixed their retail prices below the market level. ARCO monitored these fixed prices daily and secured dealer compliance through coercive tactics. ARCO threatened to reduce gasoline supply, terminate operating agreements or eliminate price allowances to dealers who refused to charge the fixed price. (J.A. 17-20.) ARCO partially subsidized its dealers' fixed prices through temporary volume allowances, which it funded by manipulating the intercompany transfer price of crude oil between its production and refining departments, and deliberately underpaying federal windfall profit taxes and state taxes. (J.A. 17-18.)[3]

In addition, ARCO restricted the supply of unbranded gasoline available to independents. ARCO reduced the volumes sold to, and price discriminated against, its unbranded purchasers. It also targeted independent refiners, traditionally the major source of supply to independents. (J.A. 14-15, 18-20, 24-26.)

ARCO's scheme accomplished its intended goal. Independents, including USA, could not meet ARCO's fixed retail prices, which were frequently lower than the wholesale prices paid by independents. (J.A. 18, 20.) While many independents were forced to exit the market, USA managed to survive by closing or selling over half of

[3] USA does not challenge price reductions resulting from ARCO's discontinuance of its credit card or any genuine cost reductions. (*See* Brief of Petitioner at 3.)

its gasoline stations and drastically curtailing its retail operations. USA lost substantial sales and profits as a direct result of ARCO's conspiracy. (J.A. 15, 20.)

In driving out the independents, ARCO eliminated the price competitive segment of the industry. As USA's complaint foresaw, the demise of independents led to the stabilization of retail margins in a concentrated gasoline market controlled by the integrated oil companies. (J.A. 20.) Replacing the independents, ARCO catapulted from the fourth-ranked seller in 1981 to the top-ranked seller by the end of 1983. (J.A. 16.)

USA's Lawsuit

On May 27, 1983, USA filed a complaint against ARCO, alleging that its conspiracy to fix below-market prices constituted an unreasonable restraint of trade in violation of Sherman Act § 1, attempted monopolization in violation of Sherman Act § 2, price discrimination under the Robinson-Patman Act and violations of various state laws.[4] (Dckt. NR 1.)

ARCO moved to dismiss the complaint, which the district court denied in part and granted in part. The court held that USA properly alleged resale price maintenance and had standing to pursue its antitrust claims as a retail-level competitor, consumer and target of ARCO's scheme. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F.

[4] These Robinson-Patman Act and state law claims, on which ARCO did not move for dismissal, have been stayed. (Dckt. NR 108.)

Supp. 1296, 1302, 1305 (C.D. Cal. 1983). However, the district court held that § 2 required dangerous probability of successful monopolization and did not reach conduct that, as USA had alleged, left the market controlled by the few major oil companies. Consequently, the court dismissed USA's § 2 claim. *Id.* at 1304.

USA filed a first amended complaint and ARCO again moved to dismiss the § 2 claim based on lack of dangerous probability of successful monopolization. The district court denied this motion. (Dckt. NR 54.) On May 3, 1984, ARCO filed its answer. (J.A. 36.)

ARCO's Motion for a Pretrial Order

On June 9, 1986, ARCO filed a motion for a pretrial order.[5] ARCO conceded, for purposes of its motion, that it committed a per se violation of § 1 by organizing a vertical conspiracy with its dealers to fix below-market prices in order to eliminate independents, including USA, from the market. ARCO moved that the court rule, pursuant to Fed. R. Civ. P. 56(d), that retail gasoline was the relevant product market and that ARCO had no dangerous probability of successfully monopolizing that market. ARCO then asked for dismissal of USA's § 1 claim

[5] ARCO originally moved for partial summary judgment as to USA's Sherman Act §§ 1 and 2 claims on March 31, 1986. USA voluntarily dismissed with prejudice its § 2 claim on April 28, 1986. (J.A. 76.) ARCO then withdrew its original motion and filed a motion for a pretrial order under Fed. R. Civ. P. 16. (Dckt. NR 83 at 6.)

"on the ground that the ruling that there is no likelihood of successful monopolization precludes [USA] from satisfying the 'antitrust injury' requirement." (Dckt. NR 83 at 2.)

Acknowledging that dangerous probability of successful monopolization is not an element of a substantive § 1 offense, ARCO nevertheless argued that the antitrust injury requirement imposes this element on private plaintiffs. ARCO arrived at this conclusion by arguing that vertical maximum price-fixing, in a case brought by a competitor, is the equivalent of single firm predatory pricing under § 2, which requires proof of a dangerous probability of achieving monopoly power.

ARCO introduced evidence only on the question of whether it had a dangerous probability of successful monopolization. ARCO submitted a declaration that its market share in California and Washington did not exceed 17% as of December 1983.[6] (J.A. 69; Dckt. NR 80 at 163, 193.) ARCO also argued that other major oil companies would prevent ARCO from exercising monopoly power.

ARCO did not make any factual showing regarding the marketplace effects of its conspiracy. Contrary to petitioner's brief, ARCO did not attempt to prove that (1) its conspiracy fixed nonpredatory prices (Brief of Petitioner at i, 37, 43); (2) its price-fixing scheme could not

[6] Curiously, ARCO omitted Nevada, where its size and conduct prompted the legislature to pass a statute that forced ARCO to divest itself of company-owned retail stations. Nev. Rev. Stat. Ann. § 598.677 (Michie 1987).

create a market structure in which ARCO could charge supracompetitive prices (*id.* at 6, 12, 43); or (3) the fixed prices charged by its dealers resulted from a pass-through of ARCO's price subsidies (*id.* at 33). ARCO instead relied on a purely legal argument that the mere absence of threatened monopolization required dismissal of USA's § 1 claim.

USA opposed ARCO's motion on the ground that ARCO's antitrust injury argument represented an improper, back door attempt to redefine the substantive antitrust law. In requiring USA to show predatory pricing and dangerous probability of successful monopolization, ARCO was complaining not about the relationship between USA's injury and the conspiracy's anticompetitive effects but about the substantive judgment that its price-fixing is anticompetitive. Recasting its argument in antitrust injury terms, ARCO sought to end-run per se condemnation of its price-fixing.

The district court granted ARCO partial judgment on USA's § 1 claim. (Pet. App. B.) The court assumed that USA could prove resale price maintenance violative of § 1 but found that such price-fixing could not cause antitrust injury unless it also constituted predatory pricing. The court held, as a matter of law, that the predatory pricing offense requires dangerous probability of successful monopolization.[7] (*Id.* ¶ 5.) Although it made no finding

[7] The district court's finding that ARCO did not have a dangerous probability of successful monopolization is

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as to the relevant geographic market, the court determined that the other major oil companies "effectively prevent [ARCO] . . . from exercising monopoly power in that market regardless of their market share." (*Id.* ¶ 4.) Contrary to ARCO's assertion, the court did not make any findings (or receive any evidence) as to the actual marketplace effects of ARCO's conduct.[8] (Brief of Petitioner at 12, 43-44.)

The district court directed the entry of judgment on the Sherman Act § 1 claim pursuant to Fed. R. Civ. P. 54(b). USA appealed the decision to the Ninth Circuit.

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erroneous. Absent a finding as to the relevant geographic market, which the court did not make and on which ARCO presented no evidence, the fact that ARCO accounted for 17% of total gallons sold in California and Washington says nothing about ARCO's market power. The scope of the geographic market is the area in which purchasers can practicably turn for substitutes. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The retail gasoline market is necessarily local. Drivers in Los Angeles will not go to San Francisco, let alone Seattle, to buy gas. *California v. American Stores Co.*, 697 F. Supp. 1125, 1129-30 (C.D. Cal. 1988), *aff'd in part, rev'd in part*, 872 F.2d 837 (9th Cir. 1989). Thus, the relevant inquiry is whether ARCO has market power in the relevant market areas, wherever they may be, and not the western states as a whole.

[8] In fact, USA filed an affidavit pursuant to Fed. R. Civ. P. 56(f) informing the court that the anticompetitive effects of ARCO's conspiracy and the relevant market could be determined only after deposition, expert and document discovery was completed. (J.A. 84-85.)

The Ninth Circuit's Decision

The Ninth Circuit reversed the district court's grant of partial judgment. *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687 (9th Cir. 1988). The majority held that ARCO's price-fixing conspiracy, which was uncontested for purposes of appeal, could cause USA antitrust injury. The court rejected ARCO's contention that the elements of predatory pricing under § 2, *viz.*, dangerous probability of successful monopolization, can be engrafted onto a § 1 offense under the guise of antitrust injury.[9]

ARCO filed a petition for rehearing and suggestion for rehearing en banc. No judge requested a vote on the suggestion for rehearing en banc. On January 10, 1989, the Ninth Circuit denied ARCO's petition. (Pet. App. C.)

SUMMARY OF ARGUMENT

ARCO organized a conspiracy with its dealers to fix below-market gasoline prices. The purpose and effect of the conspiracy was to drive out the independent marketers, the only significant source of price competition in an already concentrated industry. This conduct is per se unlawful under § 1. The losses of USA, an independent, flow from this patently anticompetitive conspiracy and constitute antitrust injury.

[9] The dissent concluded that antitrust injury requires proof of a § 2 predatory pricing offense. *USA*, 859 F.2d at 701 (Alarcon, J., dissenting).

ARCO claims that USA, the direct target of its admitted conspiracy, has not suffered antitrust injury because per se condemnation of vertical maximum price-fixing extends only to intrabrand competition. ARCO argues that, as against an interbrand competitor, its price-fixing should be viewed as the equivalent of single firm pricing governed by § 2. Therefore, ARCO concludes, to demonstrate antitrust injury USA must prove that ARCO threatens monopolization.

This Court's recent opinions expressly held that vertical price-fixing is per se unlawful under § 1 precisely because of its potential for adverse effects on interbrand competition. As a horizontal competitor, therefore, USA suffers damages that reflect the precise anticompetitive interbrand effects presumed to flow from vertical price restraints. Furthermore, even without the benefit of the per se rule, USA could demonstrate under the rule of reason that ARCO's vertical maximum price-fixing conspiracy diminished interbrand competition and that USA's losses, which flow directly from that restraint, constitute antitrust injury.

The Ninth Circuit properly declined to follow a disturbing trend among lower courts to use antitrust injury to overrule *sub silentio* the substantive provisions of antitrust laws. Nothing in *Brunswick* suggests that an anticompetitive scheme, particularly one that is per se unlawful, can be transformed into procompetitive behavior under the guise of antitrust injury. ARCO's attempt to treat unlawful price-fixing as though it were single firm price competition when applying the antitrust injury requirement is particularly egregious because it flatly contradicts the express language of the Sherman Act and

this Court's precedents that subject concerted activity to stricter scrutiny than unilateral behavior. The Ninth Circuit's reversal of the district court's dismissal of USA's § 1 claim was appropriate and should be affirmed.

ARGUMENT

I. USA CAN SHOW ANTITRUST INJURY FROM A VERTICAL CONSPIRACY TO FIX BELOW-MARKET PRICES.

ARCO's argument that USA has not suffered antitrust injury is predicated on the characterization of its vertical maximum price-fixing scheme as having "increased competition." (Brief of Petitioner at 10.) The Ninth Circuit properly rejected ARCO's contention as "contrary to the antitrust laws." *USA*, 859 F.2d at 696. This Court's recent opinions expressly recognize the negative interbrand effects of vertical price-fixing conspiracies.

A. The Ninth Circuit Correctly Held that a Plaintiff Suffers Antitrust Injury When Its Losses Reflect the Presumed Anticompetitive Effects of the Per Se Offense.

The antitrust injury requirement of Clayton Act § 4 limits plaintiffs' recoveries to losses that flow from harm to competition. 15 U.S.C. § 15; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). To determine whether the plaintiff has suffered antitrust injury, courts

examine whether the plaintiff's individual loss flows from the restraint's injury to the competitive process.

In this case, § 1 governs whether and in what ways ARCO's vertical maximum price-fixing conspiracy unreasonably restrained the competitive process in the interbrand market.[10] *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). In most cases, this requires an examination of all the particular circumstances of a restraint – including characteristics of the industry, the history of the restraint and the reasons why it was imposed – to determine whether its anticompetitive effects outweigh any procompetitive benefits. *Id.*; *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 & n.15 (1977). Certain pernicious conduct, however, falls within the per se category. Conduct such as vertical price-fixing is "manifestly anticompetitive" and conclusively presumed to restrain trade unreasonably without elaborate market analysis. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 1519 (1988).

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[10] The DOJ/FTC relies on Clayton Act § 7 cases to argue that the substantive offense does not necessarily define actionable, anticompetitive conduct. (Brief of DOJ/FTC at 13-14.) The incipiency statutes such as § 7 prohibit conduct whose effect "may be substantially to lessen competition." *See* 15 U.S.C. § 18. Thus, unlike § 1, a violation does not establish actual harm to competition. *Brunswick*, 429 U.S. at 485-86; *see also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981).

To satisfy the antitrust injury requirement, a plaintiff in a § 1 case must show that its losses reflect "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick*, 429 U.S. at 489; *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 13 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980). The injury analysis is substantially the same for per se and rule of reason offenses. In per se cases such as this one, the harm to competition is presumed and need not be proven. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-85 & nn. 7-8 (1986); *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2831 (1988).

In the oft-quoted passage from *Brunswick*, a plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489 (emphasis in original). This inquiry is precisely what the Ninth Circuit undertook. As a preliminary matter, the court examined the anticompetitive effects presumed to flow from vertical maximum price-fixing. *USA*, 859 F.2d at 690-93. The unifying rationale for the Sherman Act's per se condemnation of price-fixing is that price, the "central nervous system" of free enterprise, must be determined by the free market forces of supply and demand alone. *Id.* at 690-92; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 223, 225-26 n.59 (1940). Price-fixing of any kind directly interferes with the competitive process that the Sherman Act was intended to protect:

> Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interests of consumers have been a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.
>
> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): competition as process. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a by-product, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private hand.

Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1153-54 (1981) (footnotes omitted).

This paradigm governs vertical maximum price-fixing cases. One evil of these schemes is that they "substitute the perhaps erroneous judgment of a seller for the forces of the competitive market."[11] *Albrecht v. Herald Co.*,

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[11] [Vertical maximum price-fixing] is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing – a denial of rights guaranteed by the goals of antitrust policy. Congress

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390 U.S. 145, 152-53 (1968). Vertical maximum price-fixing interferes with a competitor's right to compete in a free market. *USA*, 859 F.2d at 693; *cf. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir. 1989); *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55, 67-68 (2d Cir. 1988). It is no defense that consumers do not, in the short term, suffer immediate injury. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-38 (7th Cir. 1986). The rule against price-fixing was meant to protect sellers as well as consumers. *USA*, 859 F.2d at 693. "A healthy and unimpaired competitive process is presumed to be in the consumer interest." *Fishman*, 807 F.2d at 536.

The Ninth Circuit then juxtaposed USA's injury with the breakdown of competitive conditions presumed to flow from the vertical price-fixing – substitution of ARCO's judgment for the impersonal market forces of supply and demand. In finding antitrust injury, the court held that "the success of some firms and the failure of other firms, when due to illegal pricing practices, must be characterized as a 'lessen[ing] [of] competition.'" *USA*, 859 F.2d at 696. USA's lost profits from having to compete

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did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125, 1149 (1987).

with fixed, below-market prices were, in the language of *Brunswick*, "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (Sherman Act protects "against the loss of profits from practices forbidden by the antitrust laws").

In addition, the Ninth Circuit held that the per se rule encompassed long-term, as well as short-term, effects. *USA*, 859 F.2d at 694 (citing *Sharp*, 108 S. Ct. at 1519-20). Taking USA's allegations of the offense, which were conceded by ARCO as true, the court found that USA's injury was necessary to the accomplishment of ARCO's long-term anticompetitive strategy. "[W]hen firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced services to consumers." *Id.* at 696. Consequently, USA's losses reflected the anticompetitive purpose and effects of per se price-fixing conspiracy.[12] *Id.* at 693-94, 696.

The Ninth Circuit rejected ARCO's invitation to find that *Brunswick sub silentio* overruled the substantive case authorities governing vertical maximum price-fixing under § 1. *USA*, 859 F.2d at 694 n.5. In doing so, the court departed from two recent Seventh Circuit opinions that

[12] ARCO appears to concede that if the per se rule presumes an unreasonable restraint on interbrand competition, USA has suffered antitrust injury. (Brief of Petitioner at 20; Pet. at 14.) Similarly, the Ninth Circuit found this part of the inquiry straightforward. *USA*, 859 F.2d at 693.

openly used antitrust injury to review *de novo* the legality of maximum resale price maintenance. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1420 (7th Cir. 1989); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984). In *Jack Walters*, Judge Posner stated his view that such price-fixing should not be per se unlawful. 737 F.2d at 706-07. Recognizing, however, that this Court held to the contrary, he retreated to antitrust injury, concluding that a dealer "would not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage." *Id.* at 708-09; *Indiana Grocery*, 864 F.2d at 1418 (applying *Jack Walters* to an interbrand competitor).

The Ninth Circuit is not alone in its rejection of the *Jack Walters* view of antitrust injury. Its opponents include other panels within the Seventh Circuit. *See Fishman*, 807 F.2d at 533. A commentator often sympathetic to the Chicago School criticized the Seventh Circuit's misuse of antitrust injury to overturn controlling statutes and Supreme Court precedent:

> I cannot escape the conclusion that Judge Posner – growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht* – has decided to undertake that task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. . . . But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L.J. 1014, 1026 (footnote omitted).

B. The Per Se Rule Presumes that Vertical Price-Fixing Has Adverse Effects on Interbrand Competition.

The basic premise of ARCO's entire injury argument is that vertical maximum price-fixing, without more, does not injure the interbrand market. It cites the dealer-initiated vertical maximum price-fixing cases that previously reached this Court. *Albrecht*, 390 U.S. at 145; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). (*See* Brief of Petitioner at 27-28, 31-32; Brief of DOJ/FTC at 18-20.) ARCO argues that because those cases focus only on effects in the intrabrand market, this Court has implicitly rejected the possibility that vertical conspiracies have adverse interbrand effects. Nothing could be further from the truth.

In *Sharp*, decided only last year, this Court explicitly recognized that "vertical price restraints reduce *inter*brand price competition because they 'facilitate cartelizing.' " 108 S. Ct. at 1520 (quoting *Sylvania*, 433 U.S. at 51 n.18). The adverse effects on interbrand competition, "the primary concern of the antitrust laws," are precisely what warranted this Court's per se treatment of vertical price-fixing. *Id.* at 1521; *Sylvania*, 433 U.S. at 52 n.1 .

Whenever there is vertical price-fixing, regardless of the level of fixed prices, marketplace decisionmaking is

left in the hands of a few suppliers instead of the suppliers and numerous independent retailers. This smaller number of competitors reduces sharply the difficulties of coordinating and enforcing a horizontal cartel.[13] Posner, *Oligopoly and the Antitrust Laws*, 21 Stan. L. Rev. 1562, 1571 (1969); Posner, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare*, 28 Stan. L. Rev. 903, 905 (1976); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). Thus, vertical price-fixing can facilitate cartelization without any one producer having or threatening to achieve monopoly power.[14]

By facilitating horizontal collusion, vertical maximum price-fixing may ultimately result in supracompetitive prices.[15] *Cf. Arizona v. Maricopa County Medical*

[13] This Court did not distinguish between maximum and minimum price-fixing in describing the "cartel facilitating" effects of vertical conspiracies. *Sharp*, 108 S. Ct. at 1520, 1525; *Sylvania*, 433 U.S. at 51 n.18. Even if, however, such a distinction were to be made, it is arguable that maximum price-fixing may be more conducive to horizontal collusion. As this Court has recognized, there will be little or no incentive to cheat when prices are already below the level at which conspirators could sell their goods. *Matsushita*, 475 U.S. at 596 n.20.

[14] Vertical price-fixing generally occurs in imperfect markets. Flynn & Ponsoldt, *supra* note 11, at 1149; *see Socony*, 310 U.S. at 224-25 n. 59 (price-fixing has utility even where conspirators do not threaten monopoly power).

[15] High entry barriers make it unlikely that new entrants would destabilize the cartel. The lack of entry by new independent marketers, even in the face of higher gasoline retail prices evidences these barriers. (J.A. 15, 20.)

Society, 457 U.S. 332, 348 (1982) (maximum price-fixing may facilitate future agreement on uniform prices); *Albrecht*, 390 U.S. at 153 (vertical maximum price-fixing may acquire attributes of minimum price-fixing); *USA*, 859 F.2d at 696 ("when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced service to consumers"). "[I]ndustry wide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987).

The facts of this case corroborate this Court's observations that vertical price-fixing has detrimental interbrand effects. ARCO conspired with its dealers to fix below-market prices in order to eliminate the independent, low-price competitors such as USA. (J.A. 14-20.) After absorbing the independents' market share, ARCO could stabilize retail margins in the concentrated market at higher levels.[16] *USA*, 859 F.2d at 696; *see* R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes and Other Materials* 336 (1981) (absence of a fringe of small sellers is conducive to collusion); R. Posner, *Antitrust Law: An Economic Perspective* 56 (1976) (same).

This Court has previously held that a manufacturer's vertical conspiracy to eliminate intrabrand discounters is unlawful per se. *United States v. Parke, Davis & Co.*, 362

[16] The long history of price coordination among the major integrated oil companies increases the probability of collusive behavior. (J.A. 13.) R. Posner, *supra*, at 61.

U.S. 29, 45-47 (1960); *see also United States v. General Motors Corp.*, 384 U.S. 127, 148 (1966). ARCO's scheme has even greater anticompetitive effects because it is designed to eviscerate interbrand price competition, the primary concern of the antitrust laws.[17]

C. The Alternative to a Per Se Presumption of Injury to Interbrand Competition Is the Rule of Reason.

Even if we adopt ARCO's predicate that the per se rule presumes an unreasonable restraint only on intrabrand, not interbrand, competition, it does not follow that USA must demonstrate injury flowing from a violation of § 2. If USA is not entitled to a presumption of

[17] As such, ARCO's scheme is also far more pernicious than that in *Albrecht*, on which ARCO relies. (Brief of Petitioner at 25-26.) It is argued that a manufacturer should be able to fix price ceilings if it grants retailers exclusive territories that enable them to charge supracompetitive prices. *See Albrecht*, 390 U.S. at 159 (Harlan, J., dissenting); *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 171-72 (7th Cir. 1988); *Jack Walters*, 737 F.2d at 706-07; Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n.20 (1981); Amicus Brief of American Newspaper Publishers Association. However, consumers who respond by switching to other brands are sending the manufacturer an economic signal that its exclusive territory system is undesirable. The apologists for vertical price-fixing err in seeking to insulate the manufacturer from such manifestations of consumer choice. "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law." *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 107 (1984) (footnote omitted). As gasoline is not sold at retail through exclusive territories, this debate need not be addressed here.

anticompetitive effect, it may still prove injury by demonstrating actual, adverse interbrand effects from ARCO's conspiracy using a rule of reason analysis. Conspicuously absent from ARCO's brief is reference to USA's factual allegations, which describe the particular injury done to the interbrand gasoline market in this case. ARCO's attempt to misuse antitrust injury to evade the substantive law of § 1, therefore, must be rejected. Under either standard, the Ninth Circuit's ruling is correct.

The general standard of liability for § 1 offenses is the rule of reason, which differs from the per se rule only in its requirement that the plaintiff prove, and not simply presume, anticompetitive effect. *Sharp*, 108 S. Ct. at 1519. The essential inquiry remains the same – whether the challenged restraint is unreasonable.[18] *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984); *Engineers*, 435 U.S. at 692. Thus, the analysis of a plaintiff's antitrust injury is identical to that under the per se rule. *Cf. Newman*, 813 F.2d at 1522-23.

USA's allegations that ARCO's conspiracy facilitated cartelization in the interbrand gasoline market state a § 1 violation under the rule of reason. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 441 n.16 (1978) (conduct facilitating horizontal price stabilization);

[18] Where the plaintiff proves a naked restriction on price or output, the burden shifts to the defendant to demonstrate a countervailing competitive justification. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). Otherwise, the plaintiff may rely either on proof of actual detrimental effects on supply, demand, or price, or on market power analysis. *Id.*

United States v. Container Corp., 393 U.S. 333, 336-37 (1969). Whether ARCO's vertical maximum price-fixing conspiracy was felt in the interbrand market, through elimination of the industry's sole significant source of price competition and facilitation of collusion in an already concentrated market is a question of fact. *HCA*, 807 F.2d at 1386. Relevant factors to be considered include the degree of reduction in the number of competitors and the resulting increase in concentration, the level of price before and after the conspiracy, the history of collusion in the industry, and barriers to entry, particularly of independents, after the conspiracy.[19] *Id.* at 1387-89; R. Posner & F. Easterbrook, *supra* p. 19, at 336-40; R. Posner, *supra* p. 19, at 55-71.

USA may prevail under the rule of reason if it proves the allegations in its complaint. ARCO deliberately targeted its below-market price-fixing conspiracy at independent gasoline stations, which were making inroads into the gasoline market through aggressive price competition. (J.A. 14-20.) It successfully eliminated this segment of the industry, leaving the other major integrated oil companies untouched. (J.A. 16-17.) As USA alleged in its complaint, the disappearance of the independents created a more concentrated industry, facilitated a general rise in prices and stabilized retail margins. (J.A. 20.) Because

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[19] The DOJ/FTC incorrectly dismisses the Ninth Circuit's concern about anticompetitive harm by saying, "We believe that the observation has no relevance to a case in which the defendant never attained more than 17% of the relevant market." (Brief of DOJ/FTC at 14 n.9.) Absent analysis of the market structure, the DOJ/FTC's belief is pure conjecture without factual foundation.

barriers to entry for independents are high, it is unlikely that new entrants will bid down these supracompetitive prices. (J.A. 15.)

Thus, even if injury to interbrand competition is not presumed, the Ninth Circuit's reversal of the district court's grant of summary judgment and its remand to the district court for a factual adjudication of the marketplace effects of ARCO's conspiracy should be affirmed.

II. ARCO'S SUPERIMPOSITION OF § 2 ELEMENTS ON VERTICAL MAXIMUM PRICE-FIXING IN ITS ANTITRUST INJURY ANALYSIS IS IMPERMISSIBLE

ARCO eschews § 1 analysis and argues instead that its price-fixing should be judged by the same standard governing single firm pricing under § 2. Recognizing that its proposal directly contradicts the Sherman Act's statutory scheme, ARCO frames its argument in antitrust injury terms. The antitrust injury requirement is not intended, however, to permit defendants to rewrite the substantive law.

A. Vertical Maximum Price-Fixing Is Not the Legal or Economic Equivalent of Single Firm Pricing and Cannot Be Subject to § 2 Standards.

ARCO's defense that its vertical conspiracy cannot cause interbrand effects absent a dangerous probability of successfully monopolization and predatory pricing rests on the presumption that vertical price-fixing is the legal

and economic equivalent of a single firm's decision to price its product below prevailing market prices.[20]

This Court's recent opinions have consistently held that the Sherman Act contains a basic distinction between concerted activity and unilateral conduct.

> The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression . . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. . . .
>
> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities . . . . Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. . . . Whatever form [per se or rule of reason] the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.
>
> The reason Congress treated concerted behavior more strictly than unilateral behavior

[20] ARCO misrepresents that USA claims damages from pricing at ARCO's company-owned stations. (Brief of Petitioner at 4 n.2, 34 n.17.) The interrogatory answer to which ARCO refers was drafted in August 1985 before USA dropped its § 2 claim against ARCO. That response made clear that USA had not completed its damage study and identified for ARCO's information only the USA and ARCO stations in closest geographic proximity to each other. (J.A. 55-56.)

> is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69 (1984) (citations and footnotes omitted, emphasis in original). ARCO's threatened monopolization element and the DOJ/FTC's predatory pricing standard ignore this bright line drawn by the Court.[21]

This Court has for decades held that price-fixing is to be treated with far greater hostility than single firm pricing. Price-fixing violates § 1 even though a single firm's decision to price at the same level would escape liability. *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986); *USA*, 859 F.2d at 694 n.6. Specifically, this Court expressly declined to apply the § 2 predatory pricing standard to below-market

[21] ARCO's defense below was based only on the threatened monopolization element and not on the level of its fixed prices. (J.A. 74-75; Dckt NR 83, Exh. 1 at 39 n.*) Consequently, the district court made no findings, and Arco presented no evidence, as to the level of fixed prices, their relationship to cost, ARCO's anticompetitive intent, or recoupment of losses. The DOJ/FTC proposes an undefined "predatory pricing" standard to be determined on remand.

price-fixing under § 1. *Matsushita*, 475 U.S. at 584-85 n.8. After noting the conflicting views of the § 2 offense, this Court held:

> We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure or cost.

Id.; *Cargill*, 479 U.S. at 117-18 n.12. The DOJ/FTC's statement that this Court adopted a § 2 predatory pricing standard in *Matsushita* is therefore false.[22] (Brief of DOJ/FTC at 15; *see also* Brief of Petitioner at 42.)

Reasonableness of fixed prices is not, and has never been, a cognizable defense.[23] Otherwise, "the Sherman

[22] This Court defined its use of the term "predatory" in footnote 8, which is set forth, in pertinent part, above. Elsewhere, this Court described the conspiracy as one "to charge below market prices." *Matsushita*, 475 U.S. at 596. On remand, the Third Circuit affirmed summary judgment based on its reading of this Court's decision as addressing plaintiff's claim of below-market pricing. *In re Japanese Electronic Products Antitrust Litigation*, 807 F.2d 44, 47-48 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987).

[23] Similarly, it is no defense that they might have been able to cause the same loss through means other than conspiracy. *Kiefer-Stewart*, 340 U.S. at 214; *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir. 1979); *Engine Specialties*, 605 F.2d at 14-15. ARCO's argument would effectively preclude recoveries from § 1 offense, including horizontal price-fixing, on the theory that competitors could have independently and lawfully set identical prices.

Act would soon be emasculated; its philosophy supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." *Socony*, 310 U.S. at 221-22; *see also Arizona*, 457 U.S. at 345; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). "The per se rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' " *Arizona*, 457 U.S. at 348 (quoting Rahl, *Competition and the Price Fixing Rule*, 57 Nw. U.L. Rev. 137, 142 (1962)).

ARCO and the DOJ/FTC's contention that "[r]educed, but nonpredatory, [fixed] prices have the same effect on a competitor as the price competition that the antitrust laws are designed to foster" is also incorrect as a factual matter. (*See* Brief of DOJ/FTC at 8, 13-14; Brief of Petitioner at 25, 33-34.) Vertical maximum price-fixing, in many respects, is a far more rational (and, therefore, more likely) strategy for the elimination of horizontal competitors than is unilateral predatory pricing. As this Court has recognized, predatory pricing is often unattractive because a single firm must be willing to sustain greater losses than the victim without any assurance that it will be able to recoup that investment. *Matsushita*, 475 U.S. at 589, 593 n.17.

Conversely, a supplier that implements a vertical maximum price-fixing conspiracy can share its losses with its downstream co-conspirators. ARCO fails to mention that its offering of price allowances was only part of the conspiracy. (Brief of Petitioner at 33.) By raising station rents by three or four hundred percent and increasing its percentage revenue from non-gasoline sales made by the dealers, ARCO forced its dealers to absorb some of

the lost revenues necessitated by below-market price-fixing.[24] While ARCO and the dealer shared the loss, nonintegrated independents such as USA had to bear the full loss imposed by ARCO's below-market price-fixing. These independents could not compete with ARCO's vertical conspiracy, at least without the benefit of a similar price-fixing conspiracy with a supplier.[25] When the cost to the defendant of engaging in a particular exclusionary method is less than or equal to the cost imposed on the victim, anticompetitive conduct is far more likely to

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[24] Thus, vertical maximum price-fixing is much easier to implement successfully than horizontal maximum price-fixing among competitors. In a horizontal conspiracy, rivals must allocate losses and future gains. *Matsushita*, 475 U. S. at 590. Thus, "[s]uch a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator." *Id.* In contrast, because the supplier has control of its dealers and the ability to coerce them, it unilaterally determines and enforces the allocation of loss. Flynn & Ponsoldt, *supra* note 11, at 1149 n.91.

[25] ARCO and the DOJ/FTC confuse antitrust injury with the measure of a plaintiff's damages. USA does not rely "simply on the theory that different prices might have prevailed in the absence of an antitrust violation." (Brief of DOJ/FTC at 14.) Rather, USA contends that the conspiracy fixed a price that could not have been obtained otherwise. Moreover, whether dealers could and would have charged the identical price even absent the conspiracy is a question of fact that USA must take into account in computing its damages. *Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985). While the exact apportionment of loss between ARCO and its dealers cannot be determined without further discovery, it seems likely, given the increased financial burdens, that dealers would not have unilaterally lowered prices to the level fixed by ARCO.

occur. *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 & n.2 (D.C. Cir.) (Bork, J.), *cert. denied*, 479 U.S. 851 (1986). Moreover, because vertical price-fixing tends to facilitate collusion and create a market structure in which sellers may charge supracompetitive prices, the conspirator has a greater probability of recouping its losses. *See supra* pp. 17-20.[26]

Contrary to the DOJ/FTC's characterization, an independent in this scenario does not succeed or fail on the basis of efficiency. (Brief of DOJ/FTC at 20.) As this Court held in a different context: "So long as the price cutter does not receive a price 'break' from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. To permit a competitor's supplier to bring his often superior economic power to bear . . . to deprive the otherwise resourceful retailer of the very fruits of his efficiency and convert the normal competitive struggle between retailers into an

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[26] ARCO now mischaracterizes its motion and the district court's findings as establishing that ARCO's conspiracy "present[ed] no danger of creating a market structure that will permit supracompetitive prices in the future." (Brief of Petitioner at 12; *see id.* at 4, 6, 43.) ARCO's motion below addressed *only* the threatened monopolization element of § 2, which does not encompass noncompetitive oligopoly markets. (Brief of Petitioner at 6 n.4; J.A. at 74-75.) *Indiana Grocery*, 864 F.2d at 1416; *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989). Therefore, the district court made no findings regarding the likelihood or existence of post-conspiracy supracompetitive pricing.

unequal contest between one retailer and the combination of another retailer and his supplier is hardly an element of reasonable and fair competition." *FTC v. Sun Oil Co.*, 371 U.S. 505, 522 (1963).

Because it assumed that concerted price-fixing and unilateral pricing are identical, ARCO and the DOJ/FTC do not even address USA's argument that the shared-cost and cartel facilitating aspects of vertical maximum price-fixing makes it a much more likely, and therefore more dangerous, strategy for eliminating interbrand competition than single firm predatory pricing. While the DOJ/FTC asserts that, as a matter of law, "only predatory pricing has the requisite anticompetitive effect" (Brief of DOJ/FTC at 12), it does not explain, and none of its cited cases support, that proposition.[27]

B. This Court Should Reject Efforts to Rewrite Substantive Offenses Under the Guise of Antitrust Injury.

The antitrust injury requirement is not license to alter what the antitrust laws define as anticompetitive

[27] As discussed earlier, *Matsushita* refused to equate maximum price-fixing and predatory pricing. 475 U.S. at 584-85 n.8. While the DOJ/FTC relies heavily on *Cargill*, that case addressed only single firm pricing and did not mention price-fixing. 479 U.S. at 114-18, 120-22. This Court did not address, because not raised below, the question of whether a single firm's pricing that created "a trend toward oligopoly pricing" was sufficient to cause antitrust injury under § 7. *Id.* at 114 n.9. The Court suggested that even a single firm with a low market share might nevertheless find a predatory pricing strategy feasible. *Id.* at 119-20 n.15.

behavior. In *Brunswick*, this Court rejected the plaintiff's claimed loss because it "divorce[d] antitrust recovery from the purposes of the antitrust laws." 429 U.S. at 487. ARCO's proposed antitrust injury standard, which denies recovery for anticompetitive conduct, is equally inconsistent with the antitrust laws.

Antitrust injury must, in this case, be linked to the substantive goals of Sherman Act § 1. This Court has expressly declined to engraft additional requirements on the § 4 remedy beyond that required by § 1.[28] *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 & n.9 (1982). To establish antitrust injury, the plaintiff must show "the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust defendants' course of conduct." *Id.* at 481. This Court has held that § 4 is to be applied in a way that "would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Id.* at 472.

Contrary to this Court's admonitions, antitrust injury is being used by some lower courts to undermine

[28] Section 1 is distinguishable from the antitrust statutes that condemn conduct that will produce future injury. *Engine Specialties*, 605 F.2d at 13. In the latter category of cases, "respondents must prove more than that petitioner violated [the statute], since such proof establishes only that injury may result." *Brunswick*, 429 U.S. at 486 (Clayton Act § 7); *J.Truett Payne*, 451 U.S. at 562 (Robinson-Patman Act § 2(a)); *Cargill*, 479 U.S. at 107 (Clayton Act § 7).

substantive antitrust goals with which they disagree. For example, this Court affirmed judgment for a distributor terminated for refusing to adhere to a vertical minimum price-fixing scheme. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984). Subsequently, however, the Seventh Circuit ruled that a terminated dealer does not suffer antitrust injury from vertical minimum price-fixing.[29] *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986). It is impossible to reconcile the *Monsanto* and *Local Beauty Supply* decisions.[30] This example illustrates how antitrust injury can, by eliminating private enforcement, permit conceded violations to go unpunished and undeterred.[31] "Even those who stress narrow economic objectives for antitrust law . . . should

[29] The Seventh Circuit in *Local Beauty Supply* arrived at this conclusion by deciding, as matter of law, damage issues that are clearly questions of fact. The court decided that discounters of beauty products cannot exist absent minimum price-fixing and necessarily "free ride" off full service dealers. 787 F.2d at 1202. These propositions, while stated as conclusions of law, depend on the circumstances of a particular case. *See Dolphin Tours*, 773 F.2d at 1511. Economic theory, while useful in evaluating the market impact of a defendant's conduct, cannot substitute for an analysis of the facts. Flynn, *Legal Reasoning, Antitrust Policy and the Social "Science" of Economics*, 33 Antitrust Bull. 713, 741-43 (1988).

[30] Professor Hovenkamp criticizes *Local Beauty Supply* as a "judicial attempt[] to undermine the political process by subordinating it to a particular economic view that has not itself attained sufficient support to be legislated into the antitrust laws." Hovenkamp, *supra* p. 17, at 1022.

[31] As another example, an actor challenged a horizontal conspiracy among motion picture studios to fix the percentage

(Continued on following page)

be concerned with the potential effects [on the substantive law] of recent antitrust injury interpretations."[32] Blair & Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. ___, ___ (forthcoming, Nov. 1989).

An antitrust injury standard that is divorced from the substantive law is wholly unworkable. Absent a consistent benchmark to guide the determination of whether the defendant's conduct injures the competitive process, conflicts among and within the circuits as to the application of antitrust injury will undoubtedly proliferate. Here, for example, ARCO and the Seventh Circuit view vertical maximum price-fixing as desirable, procompetitive conduct that does not cause antitrust injury.[33] *See*

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share of video proceeds paid to actors and retain the bulk of the revenues for themselves. The studios' conspiracy also fixed the rates paid to actors who signed contracts prior to the formation of the conspiracy. The Ninth Circuit held that the actor, the direct recipient of fixed prices for his services, did not suffer antitrust injury. *Newman*, 813 F.2d at 1522-23. This antitrust injury holding undermines the rule against horizontal price-fixing by denying the right of recovery to direct victims.

[32] To this extent, antitrust injury is to the 1980's what interstate commerce was to the 1960's. *See McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Burke v. Ford*, 389 U.S. 320 (1967).

[33] The DOJ/FTC's amicus brief in this case is a thinly veiled effort to circumvent Congress' support of the per se rule against vertical price-fixing. In response to the DOJ's original "amicus intervention program," which culminated in its request that this Court overturn the per se rule, Congress prohibited the use of taxpayer funds on behalf of defendants

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Indiana Grocery, 864 F.2d at 1418 (such price-fixing, "a practice that is itself competitive," does not cause antitrust injury); *USA*, 859 F.2d at 702 (Alarcon, J., dissenting) ("If [vertical maximum price-fixing] is not anticompetitive,it follows that no antitrust injury exists."). The Ninth Circuit disagrees, viewing such price-fixing as destructive of competition.

The Ninth Circuit correctly rejected ARCO's interpretation of antitrust injury. It held that *Brunswick* required it to "look closely at the purposes and policies underlying the antitrust laws, and . . . determine which application of the doctrine of 'antitrust injury' best implements those purposes and policies." *USA*, 859 F.2d at 689. To the extent that there are concerns about whether particular conduct is pro- or anticompetitive, those issues should be fully addressed by the substantive law.[34] *Id.* at

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charged with vertical price-fixing. *See Vertical Restraints Guidelines Resolution*, H.R. Rep. No. 99-399, 99th Cong., 1st Sess. 4 (1985). After assuring Congress that it would comply, the DOJ promulgated its Vertical Restraints Guidelines, which were criticized as a "bold attempt to circumvent the Congress." *Id.* at 8. Congress promptly asked the Attorney General to recall the Guidelines. *Id.* at 1; Pub. L. No. 99-180, 99 Stat. 1136, 1169-70 (1985).

[34] In fact, this Court has molded the substantive law to address the concerns raised by ARCO and the DOJ/FTC. In *Monsanto*, this Court articulated an evidentiary standard for proof of conspiracy that ensures that procompetitive, unilateral price competition is not deterred. 465 U.S. at 762-64; *Sharp*, 108 S. Ct. at 1520. (*See* Brief of Petitioner at 45 n.29.) In *Sharp*, this Court required proof of an agreement on price or price levels so as not to deter beneficial nonprice restraints. 108 S. Ct. at 1517, 1525. (*See* Brief of DOJ/FTC at 9.)

696. If, after a substantive analysis, this Court decides that vertical maximum price-fixing benefits competition, then it is the substantive offense, and not the injury standard, that should be revised.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's reversal of the district court's grant of partial judgment should be affirmed and the case remanded.

September 20, 1989

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

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Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this Reply Brief.

Respondent USA Petroleum Company ("USA") and its *amici* assert that ARCO's antitrust-injury argument asks the Court to rewrite the substantive elements of vertical maximum price fixing. (Respondent's Brief ("Resp. Br.") 9-10, 30-35.) ARCO, however, seeks no change in the substantive law under section 1 of the Sherman Act. ARCO asks only that the private remedies available under sections 4 and 16 of the Clayton Act not be divorced from the reasons why vertical maximum price fixing is illegal.

USA, on the other hand, does seek a change in the existing law. It seeks an expansion of the class of private plaintiffs who can challenge the low prices resulting from vertical maximum price fixing beyond the coerced dealers who have brought such claims in the past. USA would allow competitors, who frequently are poor champions of the consumer interests that are the primary concern of the antitrust laws, to attack these low prices.

USA's claim is unprecedented, as is confirmed by the failure of USA or any of its *amici* to cite a single opinion (save the Ninth Circuit opinion here) allowing a competitor to recover its lost profits and sales resulting from vertical maximum price fixing. More importantly, USA's attempt to substitute vertical maximum price fixing for its failed predatory pricing case[1] runs foursquare into this Court's antitrust-injury requirement. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) ("*Cargill*"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("*Brunswick*").

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[1] USA abandoned its predatory pricing case when it realized that the realities of the retail gasoline market (as opposed to the fictitious allegations of its complaint) made it impossible to prove dangerous probability of monopolization or predatory pricing "even by the most liberal standards." (*See* Petitioner's Brief ("Pet. Br.") 6 n.5.) USA now contends that the District Court's "finding that ARCO did not have a dangerous probability of monopolization is erroneous," because the finding was based upon the wrong geographic market. (Resp. Br. 6-7 n.7.)

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Prior to its Brief in this Court, USA consistently asserted that it could clear the antitrust-injury hurdle simply by incantation of the *per se* label.[2] The challenge of defending the Ninth Circuit decision in this Court has caused USA for the most part to abandon its formalistic contention that the *per se* label determines the antitrust-injury inquiry.[3] USA

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USA's contention comes far too late. USA not only did not dispute this finding in the District Court, it conceded that "there is no dangerous probability of monopolization." (*See* Pet. Br. 6 n.5.) USA expressly did not challenge this finding on appeal (*id.* at 7-8 n.7), which independently precludes USA from challenging the finding here. (*See* authorities cited at Pet. Br. 44 n.28.) USA's contention also is wrong as a matter of economics and law, as ARCO proved on the motion that caused USA to dismiss its section 2 claim. (*See* Dckt. NR 79, 80.) Finally, USA's proposed geographic market definition is inconsistent with its Amended Complaint. (JA 22, ¶ 46.)

[2] In the District Court, USA (i) argued that the *per se* illegality of vertical maximum price fixing made unnecessary any inquiry into the market effects of ARCO's assumed vertical maximum price fixing, (ii) did not challenge ARCO's factual showing that the reduced ARCO prices posed no threat of creating the market power necessary to charge supracompetitive prices and (iii) did not attempt to demonstrate any injury to the retail gasoline market. It instead simply asserted injury to itself as a competitor. (*See* Dckt. NR 89.) USA's Statement Of Genuine Issues In Opposition To Defendant's Motion makes this crystal clear by contending that there were only two "genuine issues of fact" on ARCO's summary judgment motion: (1) whether ARCO engaged in vertical maximum price fixing and (2) whether that price fixing "has caused USA injury and in what amount." (JA 86-87.) The District Court accepted as true both facts but found that these facts were insufficient to establish antitrust injury.

[3] USA first backed away from this position in the Brief in Opposition to the Petition ("Br. in Opp."). Apparently conceding the possibility that the antitrust-injury requirement might demand proof that the ARCO prices were predatory, USA contended that it was free to prove predatory pricing on remand because the issue had been neither tendered nor decided below. USA now apparently has abandoned this contention, which ARCO conclusively has refuted. (*See* Reply Br. In Support Of Pet. 5-9; Pet. Br. 43-44 n.27; *compare* Question Presented in Br. in Opp., i, *with* Questions Presented in Resp. Br., i.)

leaves the States' Brief *Amici Curiae* ("States' Br.") to defend that position. USA instead contends that a competitor's loss from vertical maximum price fixing constitutes antitrust injury because such loss reflects anticompetitive effects that either form the basis of *per se* illegality or that could be the reason for finding such conduct unlawful under the rule of reason.

None of the contentions advanced by USA and its *amici* has merit. The States' Brief, which most closely endorses the Ninth Circuit's opinion, is wrong at the most basic level. It, like the Ninth Circuit, impermissibly would substitute artificial line drawing for the rigorous analysis required by the Court's antitrust-injury opinions. While USA more honestly acknowledges the elements of the antitrust-injury analysis, it distorts the analysis itself.

I. A COMPETITOR CANNOT PRESUME ANTITRUST INJURY FROM THE *PER SE* ILLEGALITY OF VERTICAL MAXIMUM PRICE FIXING

ARCO's Brief demonstrated the error of the Ninth Circuit's presumption that the antitrust-injury issue is controlled by this Court's prior rulings that vertical maximum price fixing is *per se* illegal. (Pet. Br. 18-21.) Each of the three assertions made by USA and its *amici* to salvage the presumption of antitrust injury from *per se* illegality is incorrect, as shown below.

A. The *Per Se* Illegality Of Vertical Maximum Price Fixing Neither Establishes That A Competitor's Losses Reflect Anticompetitive Effects Nor Precludes The Court From Recognizing That Such Losses Reflect Procompetitive Effects

The States' Brief adopts the formalistic approach of the Ninth Circuit opinion. The States concede that a plaintiff whose injury "is traceable to a pro-competitive effect of defendant's violation" does not suffer antitrust injury. (States' Br. 10.) But, they assert that *per se* illegality "legally

foreclose[s] [ARCO] from postulating any pro-competitive effect flowing from" vertical maximum price fixing. (*Id.*)[4] The States ask the Court to put on blinders to the fact that the lower prices resulting from the imposition of dealer price ceilings are procompetitive except in limited circumstances where they are predatory. (*See* pp. 16-19 below.) Justice Harlan, dissenting in *Albrecht v. Herald Co.*, 390 U.S. 145, 159 (1968) ("*Albrecht*"), recognized that vertically imposed price ceilings "do not lessen horizontal competition" and in fact "drive prices toward the level that would be set by intense competition." While the *Albrecht* majority cited other, anticompetitive effects that in its view justified retaining the *per se* illegality of vertical maximum price fixing, it did not dispute Justice Harlan's observation that price ceilings can have procompetitive effects. The Court recently recognized that "cutting prices in order to increase business often is the very essence of competition." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1984) ("*Matsushita*").

More directly relevant here are the Court's repeated statements that vertical restraints imposed by a single manufacturer have the potential to "stimulate interbrand competition. . . ." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42

[4] USA ambiguously asserts that "[i]n per se cases such as this one, the harm to competition is presumed and need not be proven." (Resp. Br. 12.) USA is correct to the extent it states only that in a *per se* case there is a presumption of anticompetitive effects in the market sufficient to justify substantive illegality. However, USA is wrong to the extent it also purports to assert that any plaintiff injured in fact by a *per se* violation can presume antitrust injury. (*See* Pet. Br. 20-21.) USA's arguments, which it had not made when it relied upon the formalistic approach, that the *per se* rule actually is based upon anticompetitive effects felt by competitors (as discussed at pp. 8-13 below) suggest that it has abandoned that approach and therefore intends only the former meaning.

(1987); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977) ("*Sylvania*").[5] Certainly there can be no greater stimulation of interbrand competition than lower prices, which put competitors to the choice either of reducing their prices or losing business. USA and its *amicus*, the Society of Independent Gasoline Marketers ("SIGMA"), complain of just such a stimulation of interbrand competition by the vertical restraints assumed here. They complain that ARCO unlawfully coerced its dealers to pass along wholesale price reductions, which they pejoratively describe as "subsidies." (Resp. Br. 6; SIGMA Brief *Amicus Curiae* ("SIGMA Br.") 3.) Assuming, as we must for present purposes, that ARCO used illegal coercion to prevent the dealers from pocketing these "subsidies," the ARCO dealers under existing law can recover the difference between the lower prices they actually charged and the higher prices they would have charged had they continued to allow the "independents" the price "advantage" claimed by USA and SIGMA to exist prior to 1982.[6] However, the issue whether USA and the dealers' other competitors also can recover the losses they suffered as a result of this increased price competition is a different matter. The effect as to those competitors was procompetitive. As demonstrated at pp. 7-8 below, competitors do not have a right under the antitrust laws to maintain a competitive advantage.

The *per se* rule does not require the Court to ignore the procompetitive effects of price ceilings. Thus, it does not signify that each and every effect of the unlawful conduct is anticompetitive. Rather, as the parties here agree, the rule simply presumes that as a general matter the anticompetitive effects so

[5] The Court limited its statement to nonprice vertical restrictions. 433 U.S. at 51 n.18. However, as discussed at pp. 11-12 below, the only price restraint the Court sought to exclude from the statement was vertical *minimum* price fixing.

[6] The Briefs of both USA and SIGMA reveal that their underlying complaint is that ARCO increased competition with retail prices reduced to levels the independents had thought were their exclusive domain. (*See* Resp. Br. 1 (major oil companies "have generally refrained from aggressive price competition"); SIGMA Br. 2 (independents previously underpriced ARCO dealers).)

outweigh the procompetitive effects that the conduct categorically can be presumed illegal. (Pet. Br. 18-19; Resp. Br. 11.) *See NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 n.26 (1984). Antitrust-injury analysis, which USA concedes "is substantially the same for per se and rule of reason offenses" (Resp. Br. 12), requires examination of the specific effects felt by the particular plaintiff. The plaintiff cannot rely on anticompetitive effects felt by others in the market (such as the coerced dealers). It can prove antitrust injury only by showing that *its* injury results from anticompetitive effects. Accordingly, the *per se* label cannot control the antitrust-injury analysis.[7]

B. The *Per Se* Illegality Of Vertical Maximum Price Fixing Is Not Based Upon Interference With A Competitor's "Right" To Compete In A Free Market

USA, conceding that the antitrust-injury requirement demands such a showing (Resp. Br. 12), strains to show that a competitor's lost profits are the type of injury that the *per se* rule against vertical maximum price fixing is intended to

[7] The States also attempt to elevate labels over analysis by contending that USA's "lost sales and profits suffered as a competitor in the marketplace" are recoverable because such losses are a "classic form of injury under the antitrust laws." (States' Br. 11-12.) Antitrust injury does not depend upon the nature of the claimed injury in a vacuum, but rather upon the relationship between the injury and the reasons for substantive illegality. Accordingly, some lost sales and profits are antitrust injury and some are not, as is clear from *Brunswick* and *Cargill*, which denied recovery for just such losses.

In the context of vertical maximum price fixing, a coerced dealer's lost profits are antitrust injury, but the lost profits of a competitor of the coerced dealer are not. (*See* Pet. Br. 27-32.) The Brief *Amicus Curiae* of the Service Station Dealers of America mistakenly assumes that ARCO contends (and that the District Court found) that a dealer deprived by vertical maximum price fixing of "the right to control [his] retail price" does not suffer antitrust injury. (*Id.* at 1.) This issue simply is not presented here.

prevent. USA's argument is based upon the assertion that "[v]ertical maximum price-fixing interferes with a competitor's right to compete in a free market." (Resp. Br. 14.)

Neither of the opinions USA cites supports this assertion. Neither *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989), nor *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988), involved vertical maximum price fixing. The *Gold Fields* plaintiff was a target of an allegedly illegal horizontal acquisition. The *Volvo* plaintiff was a member of the horizontal conspiracy it was challenging. In the context of vertical maximum price fixing, the plaintiffs in those cases more closely resemble the coerced dealers, who concededly suffer antitrust injury, than the coerced dealers' competitors, like USA, who do not. In each case the antitrust violation directly deprived the plaintiff of "the power of independent decision-making as to price and output" (871 F.2d at 258), just as vertical price fixing " 'cripple[d] the freedom of [the coerced dealers] and thereby restrain[ed] their ability to sell in accordance with their own judgment' " in *Albrecht*, 390 U.S. at 152 and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) ("*Kiefer-Stewart*"). A competitor of the coerced dealer is not directly restrained by the unlawful conduct but retains the ability independently to determine the price it will charge in competition with the dealers who are directly restrained. Accordingly, USA's reliance on those opinions is misplaced.

More fundamentally, USA's asserted competitor's right to compete both does not exist and has not in fact provided a basis for imposing *per se* illegality on vertical maximum price fixing. The asserted right is inconsistent with the guiding principle that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick*, 429 U.S. at 488. USA simply repeats the Ninth Circuit's error in improperly equating the interests of competitors and consumers. (Resp. Br. 14-15.) A competitor may not bring an antitrust claim any time it is injured by conduct that violates the antitrust laws. Rather, it may bring such a claim only where its injury coincides with injury to consumers. *A.A.*

Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1403-04 (7th Cir. 1989) ("courts should treat with great skepticism complaints by competitors who are injured by the low prices that customers adore, when the customers are content"). (*See also* authorities cited at Pet. Br. 35-42.) And, as discussed more fully below, the Court never has identified the loss of a competitor's right to compete as a reason for the *per se* illegality of vertical maximum price fixing.

C. The *Per Se* Illegality Of Vertical Maximum Price Fixing Is Not Based Upon Adverse Effects On An Interbrand Competitor

USA also argues that its losses as an interbrand competitor amount to antitrust injury because this Court, in making maximum vertical price fixing *per se* illegal, has focused on injuries to interbrand competition. (Resp. Br. 17-20.) USA, however, does not dispute ARCO's showing that neither of the two opinions in which the Court has held such conduct *per se* illegal cited competitors' injuries. (*See* Pet. Br. 27-32.) Instead, USA cites the Court's recent decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515 (1988) ("*Sharp*"). *Sharp* not only does not support USA's position, it conclusively refutes the position.

USA claims that *Sharp* explicitly recognized that " 'vertical price restraints reduce *inter*brand competition because they "facilitate cartelizing" ' " and that these adverse effects on interbrand competition "are precisely what warranted this Court's per se treatment of vertical price fixing." (Resp. Br. 17.) The very next sentence of the *Sharp* opinion belies USA's reliance on that language in a maximum price fixing case by clearly showing that the quoted language refers only to *minimum* price fixing:

> "The authorities cited by the Court [in *Sylvania*, 433 U.S. at 51 n.18] suggested how vertical price agreements might assist horizontal price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers) or might be used to organize cartels at the retailer level."

108 S. Ct. at 1520. Only in vertical *minimum* price fixing cases, in which floors are set on retail prices, can the retailers "not pass on lower prices to consumers." Vertical *maximum* price fixing sets price ceilings. Since retailers remain free to price below the ceilings, the manufacturers would retain the incentive to cheat on a cartel by lowering their prices and increasing their volumes. Therefore, the identified danger at the manufacturer level, which is the level to which USA's Brief points,[8] is expressly limited to minimum price fixing.

Moreover, the danger of cartelization at the retail level, to which *Sharp* also refers but to which USA's Brief does not even point, is similarly limited to vertical *minimum* price fixing. The concern to which the Court there referred is grounded in the theory that price fixing that appears vertical actually can be a horizontal cartel among retailers which they coerce or induce the manufacturer to administer and police. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). Retailers have the incentive to organize such a scheme only to keep their intrabrand competitors' prices at artificially high levels (*i.e.*, to use minimum price fixing to avoid being underpriced). Retailers have no interest in organizing a scheme to fix ceilings on their prices. Price ceilings emanate instead from the manufacturer, which wishes to prevent its retailers from pocketing price cuts that it wants passed along to consumers in order to increase its sales volume. *See Sharp*, 108 S. Ct. at 1520 ("in order to meet that interbrand competition, a manufacturer's dominant incentive is to lower resale prices"). For this reason, "unilateral maximum price pressure against retailers is not the equivalent of a horizontal combination, but rather of a series of vertical agreements for the manufacturer's benefit." *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 277 (1st Cir.) (Coffin, J., concurring), *cert. dismissed*, 389 U.S. 801 (1967). Accordingly, vertical maximum price fixing presents

[8] *See* Resp. Br. 18-19 & n.16 (positing the possibility of collusion between ARCO and other major oil companies).

none of the dangers of facilitating cartelization at the retailer level found in vertical minimum price fixing.

Sharp also refutes USA's argument that ARCO's vertical maximum price fixing, by eliminating USA from the market (which it in any event did not), can be presumed to facilitate horizontal collusion among the major oil companies and thereby enable supracompetitive pricing without single-firm market power. (Resp. Br. 18-20.) The Court in *Sharp* rejected the less farfetched contention that the termination (and hence actual elimination from the market) of a "price cutter" could be presumed illegal as a result of its facilitation of cartelization. The Court stated:

> "Any assistance to cartelizing that such an agreement might provide cannot be distinguished from the sort of minimal assistance that might be provided by vertical non price agreements . . . . Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier. . . ."

108 S. Ct. at 1521. USA provides no basis to presume that the later price collusion between ARCO and the other major oil companies that it posits will be any less difficult to form and maintain. Rather, USA baldly asserts that ARCO can "stabilize retail margins in the concentrated market at higher levels" without explaining why the firms (both majors and nonmajors) with the remaining 83% of the market will not compete those prices down to competitive levels.[9] (*See* Resp. Br. 19.)

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[9] Indeed, Professor Sullivan (of counsel on USA's Brief) and Professor Fox (cited extensively by USA) agree on the extreme difficulty and low probability of forming and maintaining a manufacturer cartel,

(Continued on following page)

Finally, *Sharp* directly rebuts USA's contention, which is irrelevant in any event, that "a manufacturer's vertical conspiracy to eliminate intrabrand discounters is unlawful per se." (Resp. Br. 19-20.) The Court in *Sharp* explicitly held that such a vertical conspiracy is not *per se* illegal. 108 S. Ct. at 1525. And, in so holding, the Court specifically stated that neither of the opinions that USA cites for that proposition so hold. The Court described *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and *United States v. General Motors Corp.*, 384 U.S. 127 (1966), as involving "horizontal combinations" among competitors and not merely vertical conspiracies. 108 S. Ct. at 1525.

None of the other opinions cited by USA supports its contention that a single supplier's *intrabrand* vertical maximum price fixing can be presumed to facilitate *interbrand* cartelization, which in turn will lead to supracompetitive prices. (Resp. Br. 18-19.)

1. *Sylvania* certainly does not support that contention. Indeed, the Court there stated that intense interbrand competition, as the District Court found existed here, "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. at 51 n.19. Moreover, USA's contention that footnote 18 of the *Sylvania* opinion did not distinguish between maximum and minimum price fixing is wrong. (Resp. Br. 18 n.13.) Footnote 18 referred to "resale price maintenance," which is minimum

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(Continued from previous page)

especially in a market which is not highly concentrated, such as the retail gasoline market. *See* Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1164-65 (1981) ("The domestic oil industry is not highly concentrated;" in absence of high concentration, cartels, if formed, have little chance of success because of likelihood of entry by outsiders and cheating by insiders); L. Sullivan, *Handbook of the Law of Antitrust*, 162-63 (1977) ("strong pressures against cartelization," even in concentrated industry; "strong temptation for individual participants to cheat," resulting in "tendency for the cartel to break down").

price fixing. The article by then-Professor Posner,[10] as well as the state fair-trade laws,[11] cited therein also related only to minimum price fixing. This is confirmed by the language quoted above from *Sharp*, 108 S. Ct. at 1520.

2. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987), involved and expressly referred to vertical price fixing that was both "industry wide" and minimum. Neither circumstance is presented here.

3. The Court in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982), very carefully limited its discussion to horizontal price fixing, which was the conduct at issue there. The Court noted that "*Kiefer-Stewart* and *Albrecht* place *horizontal* agreements to fix maximum prices on the same legal – even if not economic – footing as agreements to fix minimum or uniform prices." (Emphasis added). It further noted that "*horizontal* restraints are generally less defensible than vertical restraints." 457 U.S. at 348 n.18 (emphasis added). The *Arizona* Court's comment, upon which USA relies, that a horizontal maximum price-fixing conspiracy "may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character," 457 U.S. at 348, has no application to vertical maximum price fixing involving a single interbrand competitor. *See* p. 9 above.

4. The concern expressed in *Albrecht*, 390 U.S. at 153, that vertical maximum price fixing can resemble minimum price fixing is not pertinent here for two reasons. First, USA does not contend that ARCO's price fixing inflated prices above competitive levels or otherwise effectively set price minimums. Second, to the extent that this were so, USA as a competitor of such masqueraded price minimums would be benefitted, not hurt, and therefore would not satisfy the

[10] *See* Posner, *Antitrust Policy and The Supreme Court: An Analysis Of The Restricted Distribution, Horizontal Merger And Potential Competition Decisions*, 75 Col. L. Rev. 282, 294 (1975) ("*industry-wide resale price maintenance might* facilitate cartelizing. . . .") (emphasis added).

[11] The Miller-Tydings Amendment to the Sherman Act expressly applied only to "minimum resale prices." 50 Stat. 693 (1937).

threshold requirement of antitrust injury. *Cf. Matsushita*, 475 U.S. at 596 n.20.

II. A COMPETITOR CANNOT ESTABLISH ANTITRUST INJURY FROM NONPREDATORY PRICES SET BY VERTICAL MAXIMUM PRICE FIXING

For the first time in this case, USA argues in its Brief that antitrust injury can be proved by demonstrating that ARCO's assumed vertical maximum price fixing violates section 1 not under the *per se* rule (for its anticompetitive effects on the coerced dealers) but under the rule of reason (for its anticompetitive effects on competitors of the coerced dealers). (Resp. Br. 20-23.) USA's argument fails under both of the standards for determining antitrust injury announced in *Brunswick*, 429 U.S. at 489.[12]

A. A Competitor's Losses From Nonpredatory Prices Cannot Reflect The Reasons Why Vertical Maximum Price Fixing Is Unlawful

USA's rule-of-reason approach cannot satisfy the *Brunswick* requirement that a plaintiff's loss be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489. Vertical maximum price fixing – the only conduct at issue here – is unlawful as a result of the restraint it imposes on the dealer's independence to set prices in accordance with his own judgment. (*See* Pet. Br. 28-30.) No decisional law suggests that the illegality of this conduct under section 1 depends on the level at which the coerced dealer sets his prices or on the effects of those prices on others. Accordingly, the coerced dealer's loss of pricing freedom is the only type of loss that the law against vertical maximum price fixing was

[12] Moreover, USA's offer, made for the first time in this Court, comes far too late in these proceedings. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, ___ n.2, 108 S. Ct. 1931, 1936 n.2 (1988) (the Court's practice is to "decide the case as it was framed by the Court of Appeals").

intended to prevent and the only type of loss that flows from the reason for making such conduct unlawful.[13]

USA disputes neither the legal principle that coercion is the *sine qua non* of vertical maximum price fixing nor that its section 1 case depends upon proving that ARCO "secured dealer compliance through coercive tactics." (Resp. Br. 2.)[14] Nonetheless, it attempts to rewrite the basis of such liability by arguing that vertically imposed price ceilings can be illegal as a result of effects on competitors. (Resp. Br. 21-22.) None of the opinions USA cites, however, supports its position. In each of those cases the restraint directly controlled the pricing of an interbrand competitor which was brought into a horizontal conspiracy or unlawfully acquired. Illegality was based upon this direct restraint and not upon any effects flowing from the restraint felt by competitors of the parties to the unlawful conduct. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *United States v. Container Corp. of America*, 393 U.S. 333 (1969), involved agreements to exchange price information among horizontal competitors. *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*,

[13] The SIGMA Brief asserts that the coercive loss of the dealer's pricing discretion satisfies only the section 1 requirement of concerted action, which it contends is not relevant to the antitrust-injury issue. (SIGMA Br. 13.) The Court's opinions in *Kiefer-Stewart* and *Albrecht*, as well as the Circuit Court opinions cited at Pet. Br. 29 n.16, clearly show that the dealer's loss of discretion to set prices to his retail customers also satisfies the section 1 requirement that there be an unreasonable restraint of trade. Indeed, none of those opinions cites any other restraint of trade making the concerted conduct unlawful.

[14] The States' Brief disputes both points. (States' Br. 13.) The States, however, cite no authority for their contention that vertical maximum price fixing can be found when "dealers willingly cooperate[]." That contention is rebutted by the authorities cited at Pet. Br. 27-30. If the States' position were correct, manufacturers could not suggest prices, and certainly could not seek lower dealer prices through " 'exposition, persuasion and argument.' " *Gray v. Shell Oil Co.*, 469 F. 2d 742, 748 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

481 U.S. 1038 (1987), similarly involved the elimination of significant interbrand competition directly through unlawful conduct – the acquisition of horizontal competitors. The loss of the pricing independence of an interbrand competitor through an unlawful restraint imposed directly on that competitor, which was the basis for imposing illegality in these three opinions (and the other opinions cited by USA and discussed at p. 7 above), is not even analogous to the loss suffered by a competitor as a result of having to compete against low prices that are enabled by a vertical restraint. Therefore, none of these opinions provides any support for USA's argument that it can establish that ARCO's vertical imposition of price ceilings is illegal by introducing evidence to support its allegations concerning effects in the interbrand market. (See Resp. Br. 22-23.)[15]

USA could establish that the low ARCO prices themselves (as opposed to the vertical coercion that brought them about) were illegal only by showing that they were predatory

[15] USA did not attempt on this motion to prove any of these allegations or even to contend that such allegations raised a genuine issue of material fact. (*See* p. 2 n.2 above.) The only authorities cited in any opposing Brief do not require that this Court accept such allegations as true. *Bishop v. Wood*, 426 U.S. 341, 347 (1976), and *Baker v. Department of Navy*, 814 F.2d 1381, 1382 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987) (cited at States' Br. 6), only require that "all genuine disputes as to material facts" be resolved, and that all *evidence* be viewed, favorably to USA. Moreover, the allegations cited at Resp. Br. 22-23 are inherently incredible. For example, USA contends that ARCO "successfully eliminated [the independent] segment of the industry, leaving the other major integrated oil companies untouched." The independents obviously have not been eliminated. It is clear from Respondent's Brief that USA has not been eliminated as a competitor. (Resp. Br. 1.) SIGMA's Brief states that SIGMA is composed of 315 independent marketers selling refined petroleum products in all 50 states, owning and operating over 11,000 retail stations and supplying an additional 13,700 retail outlets, and having a market share of nearly 17%. (SIGMA Br. 1.)

in violation of section 2.[16] USA then would establish antitrust injury, because its loss as a competitor would reflect the reason for imposing illegality. USA's Amended Complaint alleged that the prices were predatory. (JA 18.) However, when put to the burden of producing evidence to support its allegations, USA conceded that it could not prove predatory pricing (*see* Pet. Br. 6 n.5) and dismissed its section 2 claim. (JA 76-77.)

B. It Would Be Inimical To The Purposes Of The Antitrust Laws To Allow Recovery For A Competitor's Losses From Nonpredatory Prices Set By Vertical Maximum Price Fixing

USA's attempt to prove antitrust injury by substituting a rule-of-reason approach for predatory pricing also runs afoul of the other rationale articulated in *Brunswick* for not allowing recovery for all injuries caused in fact by an antitrust violation. The Court held that "[i]t is inimical to the purposes of [the antitrust] laws to award damages for" injuries resulting from competition. *Brunswick*, 429 U.S. at 488; *Cargill*, 479 U.S. at 109-10. Significantly, USA is a member of the very same class of plaintiffs – competitors – whose claims the Court rejected in *Brunswick*, *Cargill* and *Matsushita*. In each of those cases, the Court rejected the competitor plaintiff's claim after carefully analyzing whether the claim coincided or conflicted with the consumer interests that are the primary concern of antitrust law. (*See* Pet. Br. 35-37.) In so doing, the Court articulated a policy against allowing recovery for losses from a competitor's low prices that present no real prospect of ultimately injuring the interests of consumers.[17]

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[16] While contracts, combinations and conspiracies can be illegal under section 1, prices can be illegal only as a means of acquiring or maintaining monopoly power in violation of section 2.

[17] The States' Brief asserts that "[t]he impact of an antitrust defendant's conduct upon consumers is irrelevant as to whether a plaintiff

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USA argues that *Matsushita* and *Cargill* do not require that a competitor plaintiff in such a case show a market structure that would permit future monopoly pricing. (Resp. Br. 25-30 & nn.22, 27.) USA relies on footnote 8 in *Matsushita*, 475 U.S. at 584-85 (and its citation in footnote 12 in *Cargill*, 479 U.S. at 117-18) to argue that such a plaintiff can satisfy *Brunswick* by showing that its competitors' prices are below either the level necessary to sell their products or some measure of cost. However, both footnote 8 and the rest of the *Matsushita* opinion make clear that the Court did not intend footnote 8 to address the *Brunswick* antitrust-injury issue presented here. On its face, footnote 8 is limited to the minimum requirement, which is *necessary* but *not sufficient* for antitrust injury, that a plaintiff's losses be caused in fact by the defendant's violation.[18] Thus, the pertinent sentence of footnote 8 begins with the phrase "[f]or purposes of this case, it is enough to note" and is followed with a sentence that states "[r]espondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level."

Footnote 8 does not even cite *Brunswick*. Rather, the Court addresses *Brunswick* in the text and in footnote 7, where it describes the plaintiffs' claim as one for conspiratorial "monopolization of the American market through predatory pricing" and states that *Brunswick* requires the plaintiffs to prove "that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury [*i.e.*, *Brunswick* antitrust injury]." 475 U.S. at 584

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competitor suffered antitrust injury." (States' Br. 4; *see also* 8, 15-16.) This assertion, upon which much of the States' Brief is based, is incorrect, as demonstrated by the authorities cited at Pet. Br. 35-37 & n.19. It is incredible that the Attorneys General of eleven states would so denigrate the importance to antitrust law of the interests of consumers.

[18] It was necessary for the Court in *Matsushita* to address the cause-in-fact requirement because the plaintiffs were seeking to challenge

(Continued on following page)

n.7; *see also* 586 (only "the alleged conspiracy to monopolize the American market through predatory pricing" could inflict *Brunswick* antitrust injury).[19] Moreover, the *Matsushita* opinion as a whole, and particularly Part IV.A. thereof, confirms the need in a predatory pricing case for a market structure that will permit the conspirators to earn the future monopoly profits necessary to recoup their losses during the period of predation. *See* 475 U.S. at 588-93.[20]

Cargill is to the same effect. Contrary to USA's arguments, *Cargill* defined predatory pricing in terms of a market structure that would permit recoupment of the losses sustained during the period of predatory pricing. *See* 479 U.S. at 117, 119 n.15, 121 n.17.[21] In a recent opinion, Judge Easterbrook recognized that both *Cargill* and *Matsushita* had

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conduct by competing Japanese manufacturers that would have *raised*, not *lowered*, the prices they charged in the United States. 475 U.S. at 578, 583.

[19] USA ignores this language, and contends disingenuously that the Court described the conspiracy alleged in *Matsushita* only as "one 'to charge below market prices.' " (Resp. Br. 26 n.22.)

[20] The Court specifically rejected as a basis for imposing liability based upon the challenged low prices the theory that a defendant without monopoly power could later charge supracompetitive prices through collusion, as posited by USA here. The Court stated:

> "The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act."

475 U.S. at 592 n.16. And, the Court did not even discuss, and thereby impliedly rejected, the possibility of future supracompetitive pricing under an oligopoly theory, which is the other theory posited here by USA. (*See* Resp. Br. 29 & n.26.)

[21] USA's assertion that the Court in *Cargill* did not address oligopoly pricing certainly does not support USA's reliance on an oligopoly

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employed the "recoupment" theory to determine whether competitors' losses from low prices amounted to antitrust injury. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989). That opinion sets forth a compelling case for the Court's continuing use of this standard to determine antitrust injury:

> "Predatory prices are an investment in a future monopoly, a sacrifice of today's profits for tomorrow's. The investment must be recouped. If a monopoly price later is impossible, then the sequence is unprofitable and we may infer that the low price now is not predatory. More importantly, if there can be no 'later' in which recoupment could occur, then the consumer is an unambiguous beneficiary even if the current price is less than the cost of production. Price less than cost today, followed by the competitive price tomorrow, bestows a gift on consumers. Because antitrust laws are designed for the benefit of consumers, not competitors . . . a gift of this kind is not actionable."

Id. (citations omitted).[22] ARCO respectfully requests that the

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theory. (*See* Resp. Br. 30 n.27.) The Court refused to address the issue in *Cargill* because it had not been raised in the lower courts, which also is the case here. 479 U.S. at 114 n.9. And, USA's assertion that "even a single firm with a low market share might nevertheless find a predatory pricing strategy feasible" is inconsistent with the thrust of the very footnote it cites:

> "With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."

479 U.S. at 119-20 n.15.

[22] *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986), cited at Resp. Br. 29, similarly defines predation as "the deliberate seeking of monopoly power. . . ." (*See* Pet. Br. 41-42 & nn.23-25.)

Court reaffirm this standard and reinstate the District Court's summary judgment based thereon.[23]

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the summary judgment of the District Court reinstated.

October 20, 1989.

Respectfully submitted,

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[23] The *Amicus Brief* for the United States and the FTC suggests a remand to the Ninth Circuit to determine whether USA preserved its right to challenge the District Court's conclusion that USA could not prove predatory pricing and, if so, whether that conclusion is correct. (USA/FTC Br. 22-23 n.16.) Such remand is unnecessary for a number of reasons: (1) USA no longer asserts that it can prove predatory pricing. (2) USA did not preserve its right so to contend, both by not raising the issue on appeal and by not identifying predatory pricing as a genuine issue on ARCO's motion in the District Court. (*See* Pet. Br. 43-44 & n.28.) (3) The District Court correctly applied the "recoupment" standard to determine the issue, as this Court can decide without addressing the appropriate measure of cost to use in a predatory pricing case where the market structure makes recoupment possible.

(6)

No. 88-1668

In the Supreme Court of the United States

OCTOBER TERM, 1989

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

USA PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a firm suffers antitrust injury when it loses sales to competitors that are charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission enforce the federal antitrust laws. This case presents the question whether a firm has suffered antitrust injury as a result of nonpredatory price competition from companies that have a vertical agreement to maintain a maximum resale price. The United States has an interest in ensuring that this question is resolved in a manner that advances, rather than impedes, the procompetition objectives of the antitrust laws.

STATEMENT

1. Petitioner Atlantic Richfield Company (Arco) is a vertically integrated oil company whose operations include the marketing of Arco-brand gasoline in the western

United States. Arco sells to customers through its own stations and through independently owned stations that resell gasoline under the Arco brand name. Respondent USA Petroleum Company (USA) is an "independent" marketer of gasoline. USA, like other independents, buys gasoline from major petroleum companies for resale under its own brand name. USA's retail outlets are high volume, low overhead "discount" stations that typically charge less for equivalent quality gasoline than stations selling under a major brand name.[1] J.A. 11-16, 58-59.

In early 1982, Arco adopted a new marketing strategy to become more price-competitive with USA and other independents. Arco's strategy was to reduce its dealers' costs (*e.g.*, by eliminating credit card sales) and to encourage them to meet or beat the prices of independent stations. To accomplish that objective, Arco ga~~ve its~~ dealers such incentives as "temporary competitive allowances" and "temporary volume allowances." Arco's strategy resulted in increased sales and market share. See Pet. 3.

In early 1983, USA filed a complaint against Arco in United States District Court for the Central District of California, alleging, *inter alia,* that Arco's conduct violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[2]

[1] The primary distinction between a "major" and an "independent" oil company is that " '[a] major oil company is usually integrated in that it operates on the four functional levels of production, transportation, refining, and marketing. Generally, a non-major does not own its refinery, or if it does, the refinery is usually small. The non-major usually owns and operates its' " own stations. *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 30 n.1 (5th Cir.), cert. denied, 409 U.S. 1077 (1972) (citation omitted). USA alleged that Arco is one of the "majors", which it stated were "a small number of fully integrated enterprises which are among the largest industrial corporations in the United States and the world." J.A. 13 ¶ 9.

[2] USA also alleged violations of the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a), and the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.* (West 1987). Those claims are pending before the district court.

USA's amended complaint alleged that "Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels." J.A. 17 ¶¶ 27. Count one charged that the various incentives Arco offered to its dealers, together with "severe and predatory price cuts," were intended to drive independents out of the market in violation of Section 1 of the Sherman Act. J.A. 17-18 ¶¶ 27-29. Count two charged that Arco had engaged in an attempt to monopolize in violation of Section 2 of the Sherman Act. J.A. 21-23 ¶¶ 42-48.

In March and June 1986, Arco moved for summary judgment on the Sherman Act claims. For purposes of its motions, Arco assumed the existence of a maximum resale price fixing agreement between it and the dealers that sold Arco gasoline. Arco contended, however, that USA had not suffered the "antitrust injury" needed to pursue its Section 1 claim. Arco argued that, as a competitor, USA would suffer antitrust injury from the alleged vertical maximum price agreement only if the prices the Arco dealers charged under the agreement were predatory.[3] Arco further maintained that, as a matter of law, the record would not support a finding of predatory pricing.[4] C.A. E.R. 83, at 18-19; *id.* Exh. 1, at 35-42.

[3] Arco stated that "a 'predatory' price is one which creates the dangerous probability that the defendant(s) may achieve a monopoly with the concomitant ability to raise prices in the future." C.A. E.R. 83, at 18. See also J.A. 67-68.

[4] Arco argued that USA could not prevail on its Section 1 claim "for essentially the same reason that it cannot prevail on its claim under

The district court dismissed the Section 1 claim. The court said: "Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the 'antitrust injury' requirement of the Clayton Act § 4, without showing such prices to be predatory." Pet. App. 3b. The court then concluded that USA could make no showing of predatory pricing because, given Arco's market share and other characteristics of the relevant market, Arco was in no position to exercise market power.[5] Pet. App. 4b.

2. a. A divided panel of the Ninth Circuit reversed. The court framed the issue before it as "whether a com-

Section 2 of the Sherman Act." C.A. E.R. 83, Exh. 1 at 35. With respect to USA's Section 2 claim, Arco contended that the undisputed sales and market share evidence established that there was no "dangerous probability" that it could monopolize any relevant market. The court had earlier granted Arco's motion to dismiss USA's Section 2 claim as originally pleaded, reasoning that the complaint contained the "undisputed allegation that the end result of Arco's misconduct would be a market controlled by all of the major oil companies," and, therefore, the complaint "on its face, affirmatively alleges facts that indicate[ ] that no 'dangerous probability of success exists' " that Arco would obtain a monopoly. *USA Petroleum Co.* v. *Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983). USA subsequently amended its Section 2 claim, but, shortly after Arco filed its summary judgment motion, USA voluntarily dismissed that claim with prejudice. J.A. 78-79.

[5] Specifically, the court found that "major-brand and minor-brand gasoline retailers compete with each other in the same market" and that the 17% "combined share of the relevant market held by [Arco and its dealers] is clearly insufficient to present a dangerous probability of monopolization." Pet. App. 2b-3b. The court also found that, even if it were to "assume[ ] *arguendo* that there exists a separate 'discount' gasoline market, other major oil companies may enter this market, as USA contends that [Arco] did in April 1982, and the possibility of such entry effectively prevents" Arco and its dealers from exercising market power. *Id.* at 3b.

petitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of 'antitrust injury.' " Pet. App. 3a. The court noted that under this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), a plaintiff " 'must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " Pet. App. 4a. Applying its understanding of *Brunswick*, the court concluded that USA had sufficiently alleged antitrust injury.

The court began by recalling that under this Court's decisions, any form of price fixing violates Congress's intent "that market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail." Pet. App. 12a (citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)). Based on this observation, the court believed that the key inquiry in determining whether USA suffered "antitrust injury" was whether USA's "injuries resulted from a disruption of competition in [USA's] market caused by [Arco's] antitrust violations." Pet. App. 13a. The court concluded that this requirement was satisfied. It stated: "USA's claimed injuries were the direct result, and, indeed, * * * the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing scheme is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." *Ibid.*

The court rejected the need to explain how a maximum resale price-fixing agreement caused "antitrust injury" to a competitor, concluding instead that "the proper question

is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent." Pet. App. 14a. The court simply noted that, in general, price fixing interferes with competition because it "distorts the markets, and harms all the participants." *Ibid.* The court added that even if it were to consider maximum resale price fixing in isolation, it would reach the same result in light of the potential "long-term consequences of that practice." *Id.* at 15a.

The court also rejected Arco's argument, based on *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), that USA's injury resulted from an increase, rather than a decrease, in competition. The court characterized both *Cargill* and *Brunswick* as cases involving an "attenuated or indirect" connection between the antitrust violation and the injury because the injuries resulted only from "pricing practices" that were themselves legal. By contrast, the court noted, USA's injury "result[s] directly from pricing practices that defendants admit (for the purposes of this appeal) are forbidden by the antitrust laws and are therefore illegal." Pet. App. 15a-16a. The court concluded that the "failure of * * * firms, when due to illegal pricing practices, must be characterized as a 'lessen[ing] [of] competition', not an increase in competition." *Id.* at 19a.

b. Judge Alarcon dissented. In his view, *Brunswick* required the court to evaluate USA's injury in light of the anticompetitive effects of the specific violation alleged because "[t]he anticompetitive effects will be different depending on the type of price fixing agreement" involved. He noted that horizontal price-fixing agreements are condemned because they "create market power that did not previously exist" and that the "effect of minimum price fixing, whether horizontal or vertical, is generally higher prices." By contrast, Judge Alarcon observed, maximum

price fixing is not thought "as destructive as minimum price fixing principally because it generally results in lower prices to consumers." Pet. App. 28a-29a. He also noted Professor Areeda's view that vertically imposed, maximum price fixing agreements—which affect only one supplier's dealers—are " 'virtually never anticompetitive.' " Pet. App. 32a (citing P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 335.2h n.56 (Supp. 1987)).

Accordingly, Judge Alarcon concluded that to the extent that USA was injured by Arco's low but nonpredatory prices, it would suffer no antitrust injury. Whether or not Arco's own dealers might be able legitimately to claim that their " 'freedom' to set prices" had been impaired, it was, in his view, implausible that USA was " 'forced' * * * to match ARCO's prices when most of the market had set prices above those" of Arco. Pet. App. 33a & n.7. The majority, he argued, had erred in focusing on whether "ARCO's alleged *anticompetitive acts* were of the type the antitrust laws were intended to prevent as opposed to whether its *injury* was of the type the antitrust laws were intended to prevent." *Id.* at 37a. The alleged violation could injure USA only by "lower[ing] prices to consumers," and this type of "injury" raises concerns under the antitrust laws only if prices are so low as to be predatory. *Id.* at 36a. Accordingly, Judge Alarcon concluded that USA failed to demonstrate antitrust injury to itself. *Id.* at 39a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a plaintiff who competes with the defendant's dealers suffers antitrust injury when a maximum resale price agreement with those dealers results in nonpredatory price competition. By its holding, the court has achieved the ironic result of allowing a competitor to seek treble damages because of

lost sales due to aggressive, but nonpredatory, pricing by a rival. This holding is inconsistent with decisions of this Court and with the purposes of the antitrust laws.

A private plaintiff does not adequately state a claim for relief under the antitrust laws simply by alleging injury as a result of an antitrust violation; the plaintiff must also establish "antitrust injury" to itself. That showing must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The court of appeals' holding is incompatible with this principle. In cases involving per se violations, the court's treatment of antitrust injury would effectively dispense with any analysis of the "anticompetitive effect" of the violation and would authorize recovery whenever the plaintiff could show injury through its participation in a market "disrupted" by that violation. Such an analysis ignores the fact that when the pricing of a firm is not predatory, the business lost by its rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

The court of appeals' holding is also wrong because it is based on the mistaken premise that the antitrust laws are intended to provide a private remedy for any and all market "distortions", whether or not they are related to the pro-consumer goal of protecting competition. While several reasons have been advanced for deeming vertical, maximum price-fixing agreements to be illegal per se, see *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), it has never been a purpose of that rule to protect competitors from lower prices. Reduced, but nonpredatory, prices have the same effect on a competitor as the price competition that the antitrust laws are designed to foster.

Affording rivals the opportunity to challenge conduct that injures them only through increased competition is unnecessary to deter vertical maximum price fixing. To the extent such conduct visits on distributors the anticompetitive consequences described by this Court in *Albrecht*, those distributors have adequate incentive to sue. Recognizing antitrust injury in this case, however, would only encourage competitors to argue that their rivals' fully lawful vertical nonprice agreements are actually disguises for unlawful price restraints. The availability of that sort of claim would undercut this Court's efforts to "assure that the market-freeing effect of [rule of reason analysis of nonprice vertical restraints] is not frustrated by related legal rules." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1520 (1988).

ARGUMENT

COMPETITORS DO NOT SUFFER ANTITRUST INJURY AS A RESULT OF NONPREDATORY PRICE COMPETITION UNDERTAKEN PURSUANT TO A MAXIMUM RESALE PRICE AGREEMENT.

A. A Plaintiff Suffers Antitrust Injury Only If Its Injury Results From An Anticompetitive Effect Of the Violation Alleged

A private antitrust plaintiff must allege not only that it has been injured as a result of an antitrust violation, but also that its injury is one that the antitrust laws were designed to forestall. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Blue Shield* v. *McCready*, 457 U.S. 465, 483 & n.19 (1982); *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 539-540 (1983). In *Brunswick*, which established the requirement of antitrust injury, the Court squarely rejected the notion that every

"dislocation[ ] caused by" an antitrust violation constitutes antitrust injury compensable under Section 4 of the Clayton Act, 15 U.S.C. 15. *Brunswick* involved a challenge by bowling center owners to a merger of rival bowling centers. The plaintiffs claimed that but for the illegal merger, their rivals would have gone out of business, thereby allowing the plaintiffs to increase their market share and profits. This Court concluded that a mere causal link between the plaintiffs' injury and the violation, standing alone, was inadequate. 429 U.S. at 487. Recognizing that every antitrust violation has the "potential for producing economic readjustments that adversely affect some persons," *ibid.,* the Court held that private antitrust damage plaintiffs must satisfy the additional element of showing "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* at 489. Explaining that the antitrust laws were enacted " 'for the protection of *competition,* not *competitors*,'" *id.* at 488 (quoting *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962), the Court stressed that it would be "inimical to the purposes of the[ ] [antitrust] laws" to award damages for profits lost due to competition. 429 U.S. at 488.

The Court extended and reinforced the concept of antitrust injury in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). There, a firm proceeding under Section 16 of the Clayton Act, 15 U.S.C. 21, sought to enjoin a merger of its rivals. It alleged that it might lose profits as a result of increased price competition made possible by efficiencies resulting from the merger. The Court held that, even assuming the merger was unlawful because of the threat to competition in a relevant market, allegations of possible price competition at "some level at or slightly above [the merged company's] costs" did not establish a

threat of *antitrust* injury to a firm competing in that market. 479 U.S. at 114-117. The Court explained that nonpredatory price competition, even if undertaken with the goal of increasing market share, did not threaten antitrust injury to a competitor. "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect render illegal any decision by a firm to cut prices in order to increase market share." *Id.* at 116. See also *Phototron Corp.* v. *Eastman Kodak Co.,* 842 F.2d 95, 99-100 (5th Cir.), cert. denied, 108 S. Ct. 1996 (1988). In contrast, the Court recognized that if there were proof that the merged company "would attempt to drive [a competitor] out of business by engaging in sustained predatory pricing," that claim would stand on a different footing. Because "predatory pricing has as its aim the elimination of competition," it is a practice that can inflict antitrust injury. 479 U.S. at 117-118.[6]

The court of appeals in this case believed that because respondent alleged a price-fixing agreement, it was unnecessary to determine whether respondent's injury flowed from anticompetitive effects of the violation. All forms of price fixing, in the court's view, are illegal per se not because of the particular threats they pose to competition, but because they disrupt or distort the functioning of a competitive market in a general sense. Thus, the court concluded, a firm faced with intensified competition in a market "disrupted" by any price fixing agreement suffers

[6] The Court in *Cargill* declined to formulate a precise measure of "predatory pricing," but accepted for purposes of its opinion a definition of "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." 479 U.S. at 117. We believe that this description accurately captures the conceptual underpinning of a definition of predatory pricing. Cf. *id.* at 117 n.12; *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 584-585 nn.8-9 (1986).

antitrust injury, even if the competitor's pricing is not predatory. Pet. App. 11a-13a.

In ignoring the nature of the price competition that a firm faces, the court of appeals misunderstood the inquiry mandated by *Brunswick* and *Cargill*. This Court has been at pains to emphasize that increased, vigorous competition does not itself constitute antitrust injury to a competitor. Rather, antitrust injury arises only when the competitor is adversely affected by the anticompetitive consequences of the practices complained of. In the case of pricing practices, only predatory pricing has the requisite anticompetitive effect.[7] *Cargill*, 479 U.S. at 117-118; *Matsushita Elec-*

[7] Although the question is an important one, this case does not present an appropriate opportunity for the Court to address the question of the precise showing needed to demonstrate that petitioner's prices were "predatory." The court of appeals held that regardless of the benchmark for determining whether pricing is predatory, no such showing would be required. See Pet. App. 3a. Cf. *Cargill*, 479 U.S. at 117-118 n.12; *Matsushita*, 475 U.S. at 589. That holding would be incorrect no matter what specific standard was used to establish predatory pricing. We note, moreover, that respondent and petitioner apparently never developed a record on the cost issues that would be needed to demonstrate (or rebut) predatory pricing. It is true that respondent's amended complaint included general allegations that Arco had organized a vertical price fixing scheme with the effect of fixing prices of Arco gasoline at levels that were "artificially low and uncompetitive," "severe and predatory," and "below cost." J.A. 17-18 ¶¶ 27-29. In a subsequent pleading, however, respondent identified as a "genuine issue[] of fact" on the Section 1 claim the question whether prices were fixed "at artificially low levels," but made no reference to predatory pricing or to below-cost pricing. J.A. 78. Moreover, respondent informed the court of appeals that, because it had dismissed its Section 2 claim, it had "offered no proof on predatory pricing." Resp. C.A. Br. 6. Accordingly, the only question presented in this case is whether the alleged vertical, maximum price-fixing agreement caused respondent antitrust injury to the extent that it resulted in petitioner's dealers charging lower, but nonpredatory prices. See Pet. i.

tric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Brunswick*, 429 U.S. at 489 n.14.

The court of appeals purported to distinguish *Brunswick* and *Cargill* on the basis that those cases turned on an "attenuated or indirect" relationship between the alleged violation and the plaintiff's injury. Pet. App. 15a-16a. In neither case, however, did the Court state or imply that the injuries were too "attenuated" or "indirect" to justify the plaintiff's claim of antitrust injury. In fact, in each case the plaintiff's injury was alleged to flow directly as a consequence of an alleged antitrust violation (a merger).[8] The court of appeals also found *Cargill* not applicable here because the "pricing practices" that allegedly would have resulted from the illegal merger were not in themselves illegal or anticompetitive. Pet. App. 15a. But in this case as well, only the vertical agreement to fix maximum prices—

[8] Indeed, the relationship between the alleged violation and the injury in *Brunswick* could hardly be called "attenuated." The plaintiffs claimed that the acquisitions were unlawful because they "brought a 'deep pocket' parent into a market of 'pygmies' " (429 U.S. at 487) and that this "deep pocket" injured them by allowing the acquired bowling centers to remain in business, in competition with the plaintiff. Likewise, the merger in *Cargill* was held unlawful and enjoined by the lower courts, at least in part, because it would have provided the acquiring party with multi-plant efficiencies, thus permitting it to reduce the price of its final product (beef) while "bidding up" the price of its primary input (cattle), and subjecting the plaintiff and other producers in the market to a "price-cost squeeze." 479 U.S. at 108. The lower courts held that the same feature that made the merger unlawful—the threat of a "cost-price squeeze"—would also cause the plaintiff injury. *Ibid.* Thus, contrary to the court of appeals' analysis in this case, the flaw of the plaintiff's case in *Brunswick* and *Cargill* was not one of indirectness or attenuation of injury, but of a lack of the type of injury the antitrust laws are designed to prevent. Compare *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 540-541 & n.46 (1983) (discussing "indirect" and "remote" injury).

like the merger in *Cargill*—is illegal. Nonpredatory prices are not illegal in themselves, nor are they an *anticompetitive* consequence to a competitor. Thus, such prices do not inflict antitrust injury on that competitor simply on the theory that different prices might have prevailed in the absence of an antitrust violation.[9]

Nor does the fact that vertical, maximum price-fixing agreements are deemed illegal per se justify dispensing with the requirement that an antitrust plaintiff's injury flow from the anticompetitive consequences of the violation. The per se rule narrows the range of pertinent issues in an antitrust case, thereby reducing the burden of establishing liability. But "[b]oth *per se* rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.' * * * Indeed, there is often no bright line separating *per se* from Rule of Reason analysis." *NCAA* v. *Board of Regents,* 468 U.S. 85, 103-104 & n.26 (1984). See also *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.,* 864 F.2d 1409, 1419 (7th Cir. 1989). Regardless of the alleged violation, the antitrust injury requirement serves the purpose of limiting recovery to injuries that "reflect the *anticompetitive* effect either of the violation or of anticompetitive acts made possible by

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[9] The court of appeals suggested that nonpredatory price competition resulting from a vertical, maximum pricing-fixing agreement could be anticompetitive because "when firms conspire to fix low prices in order to drive out the competition, the long-term consequences may be higher prices and reduced service to customers." Pet. App. 19a. We believe that the observation has no relevance to a case in which the defendant never attained more than 17% of the relevant market. See Pet. App. 3b. In competitive markets, rival firms would prevent higher prices or reduced services from prevailing, to the extent that consumers desired lower prices or increased services.

the violation." *Brunswick,* 429 U.S. at 489 (emphasis added).

Any remaining doubt that a per se violation does not eliminate the need for distinct antitrust injury is swept away by *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp., supra.* In that case, the plaintiffs challenged a horizontal price fixing conspiracy, "perhaps the paradigm of an unreasonable restraint of trade." *NCAA* v. *Board of Regents,* 468 U.S. at 100. See *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332 (1982); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). The Court, however, did not conclude on that basis alone that the plaintiffs could challenge an alleged conspiracy among their rivals to set low prices.[10] Instead, citing *Brunswick,* the Court stated that the plaintiffs "must show that the conspiracy caused them an injury for which the antitrust laws provide relief" and that such a "showing depends in turn on proof that [the defendants] conspired to price predatorily * * *." 475 U.S. at 484 n.7.[11] The Court thus

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[10] The Court stated that plaintiffs "must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. * * * Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused [plaintiffs] to suffer an 'antitrust injury.' " 475 U.S. at 586.

[11] Similarly, the Court explained that horizontal price fixing that raises prices above a competitive level, though unquestionably illegal, could not possibly work *antitrust* injury to a competitor: "Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act * * *, but it could not injure respondents: as petitioner's competitors, respondents stand to gain from any conspiracy to raise the market price * * *. Cf. *Brunswick.*" 475 U.S. at 582-583. Under the reasoning of the court of appeals, however, the conclusion that prices were fixed, even if raised,

insisted that competitor-plaintiffs demonstrate not only that they were injured by their rivals' alleged per se violation, but also that the injury reflects an anticompetitive effect of the violation. This principle cannot be reconciled with the holding of the court of appeals in this case that any competitor experiencing dislocation as a result of a per se violation thereby establishes antitrust injury.

B. The Antitrust Laws Do Not Protect Competitors From Nonpredatory Pricing By Rivals

Under *Brunswick, Cargill,* and *Matsushita,* the critical question with respect to the antitrust injury requirement is whether respondent's losses from the lower but nonpredatory prices "occurred 'by reason of' that which" made the alleged vertical maximum price-fixing agreement unlawful. *Brunswick,* 429 U.S. at 488. Unfortunately, the court of appeals' "generic illegal price fixing analysis" (Pet. App. 39a (Alarcon, J., dissenting)) made it unnecessary for the majority to consider carefully the rationale for the per se prohibition of vertical, maximum price-fixing agreements. Properly analyzed, that prohibition is not intended to protect rival dealers from nonpredatory price competition.

1. Price fixing agreements differ in their purpose, operation, and effect. Thus, while all naked price fixing agreements are unlawful, they are not unlawful for the same reason. The classic price-fixing agreement is a minimum price fixing conspiracy among competitors. The Sherman Act condemns such agreements without regard to the reasonableness of the prices fixed. See *Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643 (1980) (per curiam); *United States* v. *Trenton Potteries Co.,* 273 U.S.

would be sufficient to open the door to a showing of antitrust injury, because price fixing of any variety "disrupts" the market. See Pet. App. 13a.

392 (1927). These agreements are deemed unlawful, not because of any abstract concern about "disrupting" markets, but because they directly reduce consumer welfare, which is the central concern of the antitrust laws. See, *e.g., Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 343 (1979). Minimum price-fixing agreements among competitors are deemed illegal per se because their effect is to raise prices and reduce output to the detriment of consumers.[12]

Other types of agreements affecting price, however, present different threats to consumer welfare. While vertical price fixing is illegal per se, the scope of the per se rule applicable to vertical price restraints has been carefully focused in order to avoid chilling potentially procompetitive nonprice vertical restraints. *Business Electronics Corp.* v. *Sharp Electronics Corp.,* 108 S. Ct. 1515, 1520 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U.S. 752, 763 (1984). Vertical nonprice restraints limiting competition among a single supplier's dealers "ha[ve] real potential to stimulate interbrand competition" and thereby increase consumer welfare. See *Business Electronics,* 108 S. Ct. at 1519; *324 Liquor Corp.* v. *Duffy,* 479 U.S. 335, 341-342 (1987); *Monsanto, supra*; *Continental TV, Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Accordingly, all vertical restraints except price restraints are judged under the rule of reason rather than the per se rule.

Maximum price agreements also present a more tenuous threat to consumer welfare than minimum price agree-

[12] In referring throughout this brief to per se illegal price-fixing agreements, we mean only those agreements that do not involve integrative efficiencies. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979) (concluding, in the particular circumstances before the Court, that an agreement among competitors involving price—a joint venture to market music performance licenses under "blanket licenses"—should be tested under the rule of reason).

ments. This Court has twice considered horizontal, maximum price-fixing agreements and concluded that they are "on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices." *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 348 (1982); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951).[13] Those decisions suggest two primary reasons for that conclusion. First, an agreement ostensibly setting maximum prices may operate in fact as a minimum price agreement if virtually all the participants charge the maximum price. *Maricopa County,* 457 U.S. at 348. Second, the Court has suggested that maximum price agreements may inhibit vigorous and effective competition by the parties bound, acting to "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart,* 340 U.S. at 213.[14]

In only one decision has the Court explicitly confronted a *vertical,* maximum price-fixing arrangement. In *Al-*

[13] Although the restraint in *Keifer-Stewart* also operated to fix prices vertically, see *Maricopa County,* 457 U.S. at 348 n.18 (characterizing restraint in *Keifer-Stewart* as both horizontal and vertical), the agreement that was actually challenged, and that the Court reviewed, was between two suppliers that had agreed to sell liquor only to wholesalers who would adhere to "maximim prices above which the wholesalers could not resell." 340 U.S. at 212. Under then-applicable precedent, the suppliers were deemed horizontal competitors. *Id.* at 231. Under current law, however, because the suppliers were both wholly-owned by the same company, they would be deemed incapable of conspiring under Section 1 of the Sherman Act. See *Copperweld Corp.* v. *Independence Tube Corp.,* 467 U.S. 752 (1984).

[14] Thus, in *Maricopa County,* the Court observed that the maximum price-fixing agreement among competing physicians could remove the incentive to vigorous competition by preventing those with greater skill, experience, training, or willingness to innovate from reaping commensurate rewards. 457 U.S. at 348.

brecht v. *Herald Co.,* 390 U.S. 145 (1968), a newspaper distributor sought to charge his customers more than the suggested retail price advertised by the publisher, and, after the publisher attempted to discipline the distributor by hiring other persons to take away his customers, the distributor brought suit under Section 1 of the Sherman Act. The Court held that the vertical, maximum price-fixing arrangement before it was unlawful per se. The Court acknowledged that "[m]aximum and minimum price fixing may have different consequences in many situations." But the Court reiterated the view expressed in *Kiefer-Stewart* that any agreement on price " 'cripple[s] the freedom of traders.' " 390 U.S. at 152.

The Court then explained the ways in which a vertical agreement fixing maximum prices may inhibit vigorous competition by the dealers bound by it. The Court noted that a maximum price-fixing scheme, "by substituting the perhaps erroneous judgment of a seller for the force of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." 390 U.S. at 152. "Maximum prices," the Court explained, "may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumers or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id.* at 152-153. And, by limiting the ability of smaller dealers to engage in nonprice competition, a maximum price-fixing agreement might "channel distribution through a few large or specifically advantaged dealers." *Id.* at 153. Finally, the Court observed that a maximum price-fixing agreement may "tend[ ] to acquire all the attributes of an arrangement fixing minimum prices." *Id.* at 153 & n.9.

2. Respondent's alleged injury does not reflect any of the potential threats to competition described by the Court. Respondent's losses flow from nonpredatory price

competition with firms assumed to have a vertical, maximum price-fixing agreement. But the Court in *Albrecht* did not discuss, as a policy consideration supporting the application of the per se rule to vertical, maximum price-fixing, the effect of that practice on competitors. Rather, the Court's focus was on protecting dealers in the particular product that is the subject of the maximum price fixing agreement.

Respondent, of course, did not experience any of those kinds of anticompetitive effects. For example, if the vertical agreement fixes "[m]aximum prices * * * too low for the dealer [in the product] to furnish services" desired by consumers, or in such a way as to channel business to large or well-situated distributors, *Albrecht,* 390 U.S. at 152-153, a competitor dealing in other brands would not be harmed. Indeed, a competitor might benefit since it would be free to offer the services consumers desire and for which they are willing to pay. And if the maximum price agreement "acquire[s] all the attributes of an arrangement fixing minimum prices," *id.* at 153, respondent would not suffer antitrust injury because a competitor "may not complain of conspiracies that * * * set minimum prices at *any* level." *Matsushita,* 475 U.S. at 583-585 n.8.

Indeed, respondent's alleged injury is indistinguishable from the effect of the vigorous competition that the antitrust laws are designed to promote. As the Court explained in *Cargill* and *Matsushita,* the only price competition that threatens both competitors and competition is predatory pricing. When prices do not fall below a level viewed as "predatory," a competitor faces only the rigors of marketplace competition, and succeeds or fails on the basis of the efficiency and quality of its business. Because "cutting prices in order to increase business often is the very essence of competition," *Matsushita,* 475 U.S. at 594, the lowering of prices to a nonpredatory level cannot cause an injury to

competitors that the antitrust laws are designed to prevent. See *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.,* 864 F.2d 1409, 1419 (7th Cir. 1989). See also P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 334.2c, at 306 (1988) ("protecting high price suppliers against lower priced competition desired by consumers is not an injury that the antitrust laws are designed to prevent, nor does it flow from the rationale for condemning maximum price fixing"); Page, *The Scope of Liability for Antitrust Violations,* 37 Stan. L. Rev. 1445, 1469-1470 (1985).

There is no need to dilute the antitrust injury requirement as applied to competitors in order to encourage private enforcement of the rule against vertical, maximum price fixing. If a vertical, maximum price-fixing scheme does cause the anticompetitive consequences described in *Albrecht,* the manufacturer's own dealers will suffer. Those dealers would furnish an adequate pool of plaintiffs. Cf. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters,* 459 U.S. at 542 ("existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party * * * to perform the office of a private attorney general").[15]

[15] In *Jack Walters & Sons Corp.* v. *Morton Building, Inc.,* 737 F.2d 698, 708-709 (7th Cir.), cert. denied, 469 U.S. 1018 (1984), the court of appeals held that a terminated dealer did not experience antitrust injury from a vertical, maximum price-fixing scheme. The court reasoned that "the only harm to [the terminated dealer] came from the fact that competing dealers (or [the supplier] itself) would lower their prices to consumers if the [terminated dealer] did not." 737 F.2d at 709. We do not agree with the implication of the court in *Jack Walters* that terminated or coerced dealers could never sue. In a particular case, we believe that a dealer could be injured by its supplier's maximum price-fixing scheme in a way that implicates the concerns iden-

Finally, recognizing antitrust injury when a competitor faces nonpredatory price competition may have the undesirable effect of discouraging perfectly legitimate arrangements between a supplier and its dealers. A competitor has an incentive to sue its rivals only when a vertical restraint has actually increased interbrand competition. But such enhanced competition may well be the fruit of lawful, nonprice, vertical restraints. Finding antitrust injury in cases such as this will encourage competitors to cast their challenges to potentially procompetitive nonprice, vertical restraints in a per se price-fixing mold. The litigation costs of such competitor suits could seriously undermine the Court's efforts to "assure that the market-freeing effect of [rule of reason analysis of nonprice vertical restraints] is not frustrated by related legal rules." *Business Electronics*, 108 S. Ct. at 1520.[16]

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tified by the Court in *Albrecht*, 390 U.S. at 152-153. In a proper case, therefore, we believe that a coerced or terminated dealer could establish antitrust injury.

[16] Respondent contends that it should be permitted to prove that the prices charged by petitioner's dealers were predatory, even if this Court holds that losses attributable to nonpredatory price competition flowing from a vertical, maximum price-fixing agreement do not constitute antitrust injury. Br. in Opp. 14-15. The district court concluded that respondent would be unable to demonstrate that petitioner engaged in predatory pricing, primarily because of Arco's relatively small share "of the retail gasoline market in California and Washington" (Pet. App. 3b) and its inability to forestall competition from other major oil companies if it attempted to raise prices after driving out independent competitors. *Ibid.* Cf. *Cargill*, 479 U.S. at 119-120 n.15 ("With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."). Respondent did not directly challenge the district court's finding in the court of appeals, and that court had no occasion to address the issue given its view that *any* injury respondent suffered as a result of the alleged conspiracy was antitrust injury.

We note that formulation of the appropriate measure of cost for purposes of defining predatory pricing is a difficult issue, on which this Court has not previously had occasion to rule. See *Matsushita*, 475 U.S. at 584-585 n.8; *Cargill*, 479 U.S. at 117 n.12. As discussed above, however, the question raised in the petition is expressly limited to whether antitrust injury can flow from nonpredatory prices. In our view, the court of appeals should resolve in the first instance the questions whether respondent has preserved its right to challenge the district court's conclusion about predatory pricing and, if so, whether the district court's determination was erroneous. Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 24-25 & n.44 (1979) (remanding in similar circumstances).

CONCLUSION

The decision of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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No. 88-1668

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Petitioner,

v.

USA PETROLEUM COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the American Newspaper Publishers Association (ANPA) hereby moves this Court for leave to file a brief as *amicus curiae* in this case.

As set forth in the attached brief at pp. 1-2, the ANPA has a strong interest in the disposition of this case and believes that its perspective differs from that of any party. In its brief, the ANPA urges the Court to reverse the decision below and in that respect seeks the same re-

sult as the petitioner. The ANPA, however, also urges the Court to look beyond the grounds asserted by petitioner for reversal: The decision required by the antitrust standing rules casts doubt upon the underlying rule of *Albrecht v. Herald*, 390 U.S. 145 (1968), which found vertical maximum price agreements *per se* illegal. The ANPA brief demonstrates that the rationale behind *Albrecht* has been undermined by subsequent cases and by the experience of lower courts with vertical maximum price agreements. The brief also argues that such agreements are by their nature, purpose, and effect generally beneficial to consumer welfare. Thus, the ANPA urges the Court to reconsider its decision in *Albrecht* and to rule that vertical maximum price agreements should be judged under a rule of reason.

This motion and the attached brief are timely filed in accordance with Rule 36.3 of the Rules of this Court.

Respectfully submitted,

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF *AMICUS CURIAE*

Amicus, the American Newspaper Publishers Association ("ANPA"), is a non-profit corporation whose membership consists of some 1,400 newspapers constituting over ninety percent of the daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. It submits this brief supporting reversal of the decision below, but on different grounds than urged by petitioner.

Until this Court's decision in *Albrecht v. Herald Co.,* 390 U.S. 145 (1968), it was common for daily newspapers

to sell copies at wholesale to independent distributors, who in turn resold and delivered the newspapers to subscribers. Because the lion's share of a publisher's revenue derives from advertising, and advertising revenues depend heavily on a newspaper's circulation, publishers attempted to maximize circulation by contracting with distributors to keep prices below specified levels. *Albrecht* made it *per se* unlawful for newspapers to set the maximum price at which their product could be resold. Most distributors who purchased newspapers for resale would have found it relatively easy to raise their prices and collect monopoly profits, with a commensurate reduction in circulation to the detriment of the publisher. Many publishers therefore were forced by *Albrecht* to change this method of distribution: They now sell their papers directly to subscribers at prices that they select, using either employees or independent agents for delivery, solicitation, and collection.

The newspaper industry thus presents the paradigm illustrating that the desire of a manufacturer to set price ceilings often serves, rather than restrains, competition and directly benefits consumers. The principal effect of the *Albrecht* prohibition in the newspaper industry has been to force publishers to sell directly to subscribers in order to ensure that distributors do not take advantage of their positions to raise retail prices. Were *Albrecht* overruled, publishers once again would be able to choose the most effective system of distribution, without the constraint of a legal rule that serves no sensible economic purpose.

ARGUMENT

The court below was in error in holding that respondent could suffer cognizable competitive injury because petitioner's alleged maximum price agreement with its dealers forced respondent to charge consumers lower prices. But this Court should not limit itself to reversing the judgment on the principal ground raised by the petition—lack of antitrust standing. If the Court did so, the only plaintiffs who could enforce the *Albrecht* prohibition against price ceilings would be dealers hoping to charge higher prices to consumers. To avoid this anomalous result, the Court should reexamine the merits of the *Albrecht* rule.

The fact of the matter is that, in the absence of predation, vertical maximum price agreements will almost always have procompetitive consequences—making more goods available to consumers at lower prices. This has nothing to do with the standing of the complaining party, but rather inheres in the substance of the alleged conduct. This Court should, therefore, overrule *Albrecht* and remove vertical agreements setting price ceilings from the category of restraints that are unlawful *per se* under the antitrust laws.

I. This Court Should Reconsider Its Ruling in *Albrecht* That Vertical Maximum Resale Price Agreements Are Unlawful *Per Se.*

The petition purports to present only a narrow question of antitrust standing: whether a distributor can sue for treble damages when a rival and the rival's supplier have agreed to a price ceiling. As shown in the petition, the answer to this narrow question is easy.[1] It would be untenable, however, for the Court to stop at

[1] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court ruled that an antitrust plaintiff must show that it suffered an anticompetitive harm of the type that the antitrust